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# INDEPENDENT REGULATORY COMMISSIONS

## ANSWERS OF INTERSTATE COMMERCE COMMISSION, FEDERAL TRADE COMMISSION, FEDERAL POWER COMMISSION, SECURITIES AND EXCHANGE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND CIVIL AERONAUTICS BOARD TO JULY 15, 1959, SUBCOMMITTEE QUESTIONNAIRE CONCERNING REQUIREMENTS FOR HEARINGS, HEARING RECORD, EX PARTE COMMUNICATIONS, AND OTHER MATTERS

PREPARED FOR

SPECIAL SUBCOMMITTEE
ON LEGISLATIVE OVERSIGHT
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

DECEMBER 1960

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# APPENDIX E

## Answers of Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Securities and Exchange Commission, Federal Communications Commission, and Civil Aeronautics Board to July 15, 1959 Subcommittee Questionnaire Concerning Requirements for Hearings, Hearing Record, Ex-Parte Communications, and Other Matters

### 1. Copy of Letter Dated July 15, 1959, Requesting Answers to Nine Questions, Addressed by Chairman Harris to the Chairman of Each of the Above Commissions and Board

July 15, 1959.

Dear Mr. Chairman: As you know, the subcommittee is currently engaged in aiding the House Committee on Interstate and Foreign Commerce to reexamine proposed legislation dealing with improper influences on agency decision and ex parte communications generally. Many of the comments and criticisms of this legislation made by agency members at our recent panel discussions have proved extremely helpful. We would like to continue calling on the agencies for aid in drafting legislation which will be effective and yet, at the same time, not unduly hamper agency action. In order to draw upon your firsthand knowledge of agency procedures we have prepared a brief series of questions. Although we realize that some of the information we are requesting is available in scattered form elsewhere, we feel it would be helpful to us to bring together in one place some of the basic material for our reexamination of the legislation.

In answering these questions please be specific in listing the procedures which the questions call for. We are interested, at the present time, in the particularized functions of the agency and not in general categories or classifications. The term "proceeding" as used in the questions is not based on the definitions of that term contained in any proposed legislation. It is merely a generalized reference to the functions of the agency, and, as such, includes adjudication, rulemaking, investigation, as well as other agency processes which do not fall within a recognized classification.

If you find that our questions are incomplete, or think that any other information might be helpful, please feel free to set forth additional material separately from the answers to the specific questions.

The following are the questions we have prepared. We would greatly appreciate having this information by July 27, 1959.

1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action, e.g., the proceeding leading to a determination whether enforcement procedures should be invoked.

2. Which of these final determinations are required by law or by current agency regulation (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?

3. In which of the instances listed in question 2 do you make determinations preliminary to the formal hearing in proceedings which are not made a part of the ultimate record on which decision is based?

4. In what cases is it optional with the agency whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views? What are the agency standards used to determine whether a hearing will be held?

5. Which final determinations are by law or by agency regulation (please cite the applicable regulation) not made on the basis of the record of a hearing at which interested parties are entitled to present their views? This list should include all determinations which may be based in part on a hearing but for which the record is not the sole basis of decision.

6. In which of your proceedings do you consider it improper for ex parte communications to be made to the agency?

7. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed, but that such communications are proper only if made a matter of public record?

8. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed and that such communications not be made a matter of public record?

9. In answering questions 6, 7, and 8, to what extent would you differentiate between communications of the agency staff to those in the agency having the responsibility for decision, whether initiated by the decisionmaker or by other agency members, and similar communications from those outside of the agency? If you do so differentiate please indicate specifically in what proceedings communications from the agency staff to the decisionmakers (and those of their immediate staff who participate in the process of decision) are highly desirable but should be made a matter of public record, and in which proceedings unrecorded communications should be allowed.

Thank you very much for making this information available to us. With your cooperation we should be able to present effective and workable legislation.

Sincerely yours,

OREN HARRIS, *Chairman.*

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2. ANSWERS OF INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
*Washington, D.C., July 16, 1959.*

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, Congress of the United States, Washington, D.C.*

DEAR CHAIRMAN HARRIS: I have your letter of July 15 requesting certain information for your subcommittee in its reexamination of proposed legislation dealing with improper influences in agency decision and ex parte communications generally.

We shall proceed immediately to comply with your request and I will write you again just as soon as the material has been assembled.

Sincerely yours,

KENNETH H. TUGGLE, *Chairman.*

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
*Washington, D.C., March 31, 1960.*

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, George Washington Inn, Washington, D.C.*

DEAR CHAIRMAN HARRIS: This is in further reply to your letter of July 15, 1959, in which you requested detailed information with respect to the proceedings of this Commission in relation to proposed legislation dealing with improper influences on agency decision and ex parte communications generally.

For convenience, your questions and our answers are set forth together. I believe that your questions 1 and 2 can be answered usefully together, as follows:

"1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action, e.g., the proceeding leading to a determination whether enforcement procedures should be invoked.

"2. Which of these final determinations are required by law or by current agency regulation (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?"

| *Procedures which result in a final determination* | *Final determinations required to be made upon the basis of a record of a hearing*[1] |
|---|---|
| 1. Complaints filed under section 13 (1) of the Interstate Commerce Act may raise a broad variety of issues as to whether railroads and other carriers subject to part I of the act have done or omitted doing anything in violation. Under section 13(2), the Commission on its own motion may investigate such acts or omissions with the same powers and authority as when it acts upon complaint. These complaint proceedings under section 13 involve a wide range of questions as to carrier obligations, such as under sections 1(4), 1(5), 1(6), 1(9), 2, 3(1), 3(4), 4 etc. Similar complaint and investigation provisions appear in parts II, III, and IV of the act. | Yes. Section 13 of act. |
| 2. Proceedings under section 1(14) (a) to establish rules with respect to car service by railroads, including the compensation to be paid by a railroad for the use of a car owned by another (per diem charges). | Yes. |
| 3. Proceedings under section 1(15) for the establishment of emergency car service rules (including joint use of terminals, traffic priorities, and embargoes). | Hearing optional with Commission. Section 1(15). |
| 4. Proceedings under section 1(16) involving the rerouting of traffic which a railroad is unable to handle. | Hearing optional. Section 1(16). |
| 5. Proceedings under section 1 (18)–(20) on applications for certificates of public convenience and necessity authorizing the extension or abandonment of a line of railroad. | While section 1(19) empowers the Commission to make regulations as to hearings, the Commission in practice holds hearings except in certain cases in which the applications are not opposed. |
| 6. Proceedings under section 1(21) to compel a railroad to provide itself with safe and adequate facilities or to extend its line. | Yes. |
| 7. Proceedings under section 3(2) to prescribe rules and regulations as to the time within which railroads and express companies must collect their charges. | No. |
| 8. Proceedings under section 3(5) to determine whether a railroad should be required to permit another railroad to use its terminal facilities. | Yes. |

[1] "Hearing" is used as including the presentation of evidence in contested cases either orally or in written form.

| *Procedures which result in a final determination*—Continued | *Final determinations required to be made upon the basis of a record of a hearing*[1]—Continued |
|---|---|
| 9 Granting relief from the long-haul, short-haul restrictions of section 4. | No. |
| 10. Under section 5(1), the approval or disapproval of pooling agreements between carriers. | Yes. |
| 11. Under section 5(2), determination of applications for approval of carrier mergers, acquisitions of control, and trackage agreements. | Section 5(2)(b) provides that if the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearings; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. When Commission proceeds under section 5(7) to determine whether there has been a violation of section 5(7), it must hold a hearing. |
| 12. Under section 5 (14)–(16), to determine whether a railroad illegally controls or has an interest in a common carrier by water operated through the Panama Canal or elsewhere, or whether a railroad should be allowed to acquire control of or an interest in a common carrier by water not operated through the Panama Canal. | Yes. |
| 13. Under section 5(a), to determine applications by rail, water, or motor carriers or by freight forwarders for approval of an agreement among carriers relating to rates, etc. | Yes. |
| 14. Under section 6(3), authorizing railroads to make rates effective upon less than the usual 30 days' notice. | No. |
| 15. Under section 6(6) the prescription of rules governing the form and manner for publishing and filing tariffs. | No. |
| 16. Under section 6(6) the rejection of tariffs not in accordance with the Commission's rules. | No. |
| 17. Under section 6(11), to require a railroad to establish a physical connection with the dock of a common carrier by water, and to establish proportional rates on traffic which has a prior or subsequent movement by water. | Yes. |
| 18. As indicated above, section 13 (1) and (2) contain the Commission's general authority to enforce the Interstate Commerce Act. Under section 13 (3) and (4), to determine whether an intrastate railroad rate or fare discriminates against shippers or localities in interstate commerce or imposes an undue burden upon interstate commerce. | Yes. |

[1] See footnote on p. 3.

| *Procedures which result in a final determination*—Continued | *Final determinations required to be made upon the basis of a record of a hearing*[1]—Continued |
|---|---|
| 19. Under section 13a(1), to determine whether to investigate and whether to suspend, pending investigation, a railroad's proposed discontinuance or change in the operation of an interstate train or ferry, and whether to require continuance of the operation or service of such train or ferry. | The Commission may determine not to hold a hearing. It must hold a hearing before it requires the railroad to continue the service. |
| 20. Under section 13a(2), to determine whether to grant an application by a railroad for authority to discontinue or change the operation or service of an intrastate train or ferry. | Yes. |
| 21. Under section 15(1), the prescription of just and reasonable rates or minimum or maximum rates for railroads. | Yes. |
| 22. Under section 15 (3) and (4), the prescription of through routes and joint rates for railroads and for railroads and common carriers by water. | Yes. |
| 23. Under section 15(6) the prescription of divisions of joint rates between the carriers participating in such joint rates. | Yes. |
| 24. Under section 15(7), the Commission is empowered to suspend for not more than 7 months the operation of any new rate pending an investigation into the lawfulness of the rate. | In determining whether or not to suspend, the Commission is not required to hold a hearing. |
| 25. Under section 15(13), the determination of reasonable charges to be paid by carriers for transportation services or instrumentalities furnished by shippers. | Yes. |
| 26. Under section 19a, to ascertain the value of the properties of railroads and pipelines. | Yes. |
| 27. Under section 20 (1)–(5), to require annual and other reports from railroads, uniform systems of accounts, rates of depreciation, etc. | No. |
| 28. Under section 20a, to determine applications by carriers for authority to issue securities. | Section 20a(6): State authorities may make representations to the Commission, and "The Commission may hold hearings, if it sees fit * * *." |
| 29. Under section 20b, to determine applications for modification of railroad financial structures. | Yes. |
| 30. Under section 22(1), to authorize railroads to give reduced rates on disaster relief shipments. | No. |
| 31. Under section 25, to require a railroad to install specified safety devices. | Probably. |

I have summarized above, in response to questions 1 and 2 of your letter, the proceedings contemplated by part I of the Interstate Commerce Act which applies largely to railroads. Parts II, III, and IV of the act apply, respectively, to motor carriers, water carriers, and freight forwarders. These parts are more or less modeled upon the regulatory patterns of part I, and there would

[1] See footnote on p. 3.

appear to be no advantage in repeating all of the corresponding provisions of these parts. However, there are summarized below the principal types of proceedings under part II which have no close counterpart under part I. Also, the proceedings enumerated above and below illustrate the Commission's functions under such related statutes as the safety appliance acts.

| *Procedures which result in a final determination*—Continued | *Final determinations required to be made upon the basis of a record of a hearing*[1]—Continued |
|---|---|
| 32. Under section 204(a) (1)–(4), the Commission is empowered to issue rules governing motor carrier records, uniform systems of account, safety, and qualifications and maximum hours of service of employee. | No. |
| 33. Under 204(a)(4a), to exempt and to revoke exemption of transportation solely within a State from Federal regulation. | Yes. |
| 34. Section 204(c) confers upon the Commission general power to investigate and to compel compliance (as with cease and desist orders) with part II of the act. | Yes. |
| 35. Section 204 (e)–(f), to prescribe regulations governing the leasing of motor vehicles to motor carriers. | No. |
| 36. Under sections 206, 207, and 208, the determination of applications for motor common carrier certificates of public convenience and necessity. | Yes, except that some unopposed applications are granted without hearing. |
| 36a. Under section 7 of the Transportation Act of 1958, the determination of applications for "grandfather" applications to transport previously exempted agricultural commodities. | Same as above. |
| 37. Under section 209, the determination of applications for motor contract carrier permits. | Same as above. |
| 38. Under section 210a(a), to grant temporary motor carrier operating authority to satisfy an immediate and urgent need for service which existing carriers cannot meet. | No. |
| 39. Under section 210a(b), to authorize, pending determination of an application under section 5, one motor carrier to operate the properties of another motor carrier to preserve the latter's properties, etc. | No. |
| 40. Under section 211, the issuance of brokers' licenses. | Same as under 36. |
| 41. Under section 212(a), the revocation or suspension of certificates, permits, and licenses. | Yes, except that certificates, etc., may be suspended without hearing on specified grounds. |
| 42. Under section 212(b), the transfer of certificates or permits (in cases not governed by sec. 5). | No. |
| 43. Under section 212(c), the conversion to common carrier status of contract carriers whose operations do not conform to the new definition of contract carriers added in 1957. | Same as 36. |

[1] See footnote on p. 3.

| *Procedures which result in a final determination*—Continued | *Final determinations required to be made upon the basis of a record of a hearing*[1]—Continued |
|---|---|
| 44. Under section 215, the issuance of rules governing the filing and approval by motor carriers of insurance policies and other security for the protection of the public. | No. |
| 45. Certain functions under section 77 of the Bankruptcy Act relating to railroad reorganizations. | Yes. |

3. In all of the proceedings listed in response to question 2, certain procedural questions are raised in informal discussions or deliberations which are not made a part of the subsequent formal record. Such questions would include the time and place of hearing and consolidation with similar or related matters. Again, if the proceeding is one instituted by the Commission (as distinguished from the filing of a complaint or application by a private party) the determination to institute the proceeding may have been the result of an investigation by the Commission's staff. The information obtained in such preliminary investigation would not be a part of a subsequent formal record except to the extent that it was formally introduced as evidence.

A formal determination after hearing as to the lawfulness of a new rate (see item 24 above) is often preceded by an informal proceeding under section 15(7) (or corresponding provisions of other parts of the act) on written protests asking that the rate be suspended pending investigation. Such protests and the reply of the carrier proposing the rate, do not become a part of the subsequent record in a proceeding to determine the lawfulness of the rate, except by stipulation of the parties.

Similarly, the application and other papers involved in the Commission's grant or denial of temporary motor carrier operating authority pursuant to section 210a(a) (see item 38 above) pending the determination of an application for permanent authority, are not made a part of the formal record in the permanent application proceeding.

4. Of course, with respect to all matters in which a hearing is not required by the act or by due process of law, the Commission may in its option hold a hearing where it believes that such will be in the public interest. For example, although not required to do so, the Commission held extensive hearings prior to the promulgation of its original motor vehicle leasing rules and prior to its extensive interpretation of the agricultural commodity exemption in section 203(b)(6).

In addition, certain sections of the act specifically provide that hearings shall be optional. For example, in the establishment of emergency car service rules under section 1(15), or in rerouting traffic under section 1(16), hearings are optional and rarely if ever held. In this instance, the standard for determining whether a hearing will be held is whether the emergency (such as a freight car shortage) allows time for the conduct of a hearing.

Similarly, as indicated in item No. 11 above, section 5(2)(b) gives the Commission considerable discretion as to whether to hold a hearing on applications for approval of carrier mergers, leases, and acquisitions of control. In determining whether to hold hearings in such cases, the Commission considers primarily whether there is any opposition to the application and secondarily the nature and scope of the carrier interests involved in the proposed transaction.

Section 20a(6) provides that in determining applications for authority to issue securities, "the Commission may hold hearings, if it sees fit * * *." The Commission rarely holds hearings in these cases (unless consolidated with another proceeding in which a hearing is required) primarily because few applications under section 20a are opposed by anyone. Even where there is opposition, the Commission may deny a hearing unless there is a showing that relevant evidence would be produced, in view of issuer's needs to cope with underwriting deadlines and changing conditions in the security markets.

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[1] See footnote on p. 3.

It should also be noted that the Commission's issuance of substantive rules (such as safety rules under section 204(a)(1)–(4)) is subject to the requirement of section 4 of the Administrative Procedure Act that interested persons be afforded an opportunity to participate in the rulemaking by presenting their views in some manner. This requirement can be dispensed with only if the Commission "finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

5. Final Commission determinations which are not (or at least often are not) made on the basis or solely on the basis of the record of a hearing at which interested persons are entitled to present their views, are listed above in response to your question 1 as items 3, 4, 7, 9, 14, 15, 19 (the initial determination whether to hold a hearing), 24 (in determining whether to suspend), 27, 28 (unless a hearing is held at the Commission's option), 30, 32, 35, 38, 39, 42, and 44. To these classes of regulatory actions, there should be added such administrative decisions as whether to refer alleged criminal violations of the act to the Department of Justice for criminal prosecution.

The Commission is not required by any law or regulation to hold any kind of a hearing before changing its rules of procedure. However, it has done so in connection with some major procedural changes.

6. We consider it improper for ex parte communications to be made to the Commission with respect to the merits of any proceeding which is required by law to be determined only upon the record made in a hearing. This would include the above listed proceedings as to which question 2 is answered "yes." We would except from this principle communications made to attorneys for the Commission who sometimes appear in proceedings in a prosecuting capacity and who do not participate in the Commission's decisional process. Such an exception is necessary to permit discussion of settlement.

7–8. We find it difficult to answer these questions precisely for all of the types of proceedings under the Interstate Commerce Act. However, perhaps some generalizations and some examples will be of assistance to the subcommittee.

At the outset, we believe it essential to the performance of our duities that we keep ourselves currently informed as to general conditions and trends in the transportation industry. This involves not only the reading of trade and professional publications, but a certain amount of informal discussion with representatives of carriers and shippers. Obviously, the general information and impressions which we thus obtained should not be the basis for our findings in cases which by law must be determined solely on the evidence received in a formal hearing. In all frankness, however, we do not believe that we should even attempt to lay aside this general background information when we are deciding in general rulemaking proceedings the extent to which a particular mode of transportation can afford the cost of compliance with certain safety proposals. Indeed, the possession and use of such background information is the essence of the expertness which we are expected to apply to the Nation's transportation problems.

Also, we recognize that so-called ex parte communications relating to the merits of a pending case and directed to an agency member or employee are only one of the possible ways of attempting to influence official action under present conditions. At the outset, we can assume, even without such communications, that each of the parties or carrier factions in a contested case before us desires a decision in its favor. Moreover, trade and professional publications are replete with the press conferences, speeches, and resolutions of industry personalities and groups, many of which are intended to influence the views of the Congress and of the Commission.

Generally, in cases in which our decisions are not required by law to be based solely upon the evidence received in a hearing, we believe that ex parte communications, even as to the merits, should not be prohibited. We are not prepared to say that such communications are always "desirable." There are obvious dangers in relying upon information or argument which has not been restrained or tested by publicity and reply.

Accordingly, when we are engaged in informal rulemaking proceedings looking to, for example, the prescription of general accounting or safety rules, we believe that written ex parte communications relating to the merits ordinarily should be made a part of the public record or docket. However, we doubt the practicality of a requirement that we reduce to writing every oral comment that we may hear on the subject of such rules.

Conversely, when we are determining uncontested applications or exercising such emergency powers as granting temporary motor carrier authority or issuing railroad car service orders, we believe it essential that we be able to inform ourselves quickly by any available means without regard to any concept of a record.

9. In our answers to your questions 6, 7, and 8, we differentiated between communications from employees of the Commission who assist us in the final decisional process and similar communications from persons outside the Commission. We consider it absolutely essential to the effective administration of the Interstate Commerce Act that we be able to obtain the candid advice of such employees in all types of proceedings. Of course, we may not act, in cases which must be decided upon a hearing record, upon facts submitted by our staff and not made a part of the record. Similarly, in cases of adjudication, we may not consult employees of the Commission who have performed investigatory or prosecuting functions in that case or in a factually related case. However, we need the confidential advisory assistance of members of the Commission's staff (who have not engaged in such inconsistent functions) just as much as do the courts and legislative committees. There would be no point in making such staff recommendations a part of the public record unless private parties may in some way challenge such recommendations before we consider them—thereby prolonging the proceeding indefinitely.

We hope that the views set forth above will be of assistance to the subcommittee.

Sincerely yours,

JOHN H. WINCHELL, *Chairman.*

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### 3. ANSWERS OF FEDERAL TRADE COMMISSION

JULY 29, 1959.

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In reply to your letter of July 16, 1959, submitting a series of nine questions calling for a brief characterization of the particularized functions and procedures of the Federal Trade Commission, replies are submitted herewith in a memorandum with exhibits appended, which I trust will serve your purpose.

Assuring you of our continued willingness to cooperate at all times with your subcommittee, I am

Sincerely yours,

EARL W. KINTNER, *Chairman.*

MEMORANDUM ON FEDERAL TRADE COMMISSION PROCEDURES IN ANSWER TO QUESTIONS SUBMITTED JULY 15, 1959, BY THE SPECIAL SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT

***Question No. 1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action, e.g., the proceeding leading to a determination whether enforcement procedure should be involved.***

The procedures of this agency resulting in a final determination of any kind including determinations as to the desirability of agency action are made in part by the staff under authority delegated to it by the Commission and by the Commission itself. Generally, such determinations are divided into nonadjudicative or informal procedures on the one hand and adjudicative procedures or formal proceedings on the other. Of course, the final determinations in all adjudicative proceedings or formal matters are made by the Commission itself.

#### A. NONADJUDICATIVE-INFORMAL PROCEDURAL DETERMINATIONS

*I. Investigations*

Inquiries and investigations are conducted under the various statutes administered by the Commission usually through interviews by attorney examiners working out of its nine branch offices. Determination to conduct investiga-

tion is made by reason of complaints of the public or competitors, or upon the Commission's own initiative. They are conducted by direct instruction of the Commission and by the Director of its Bureau of Investigation by delegation of authority. All investigations are for the purpose of determining whether or not corrective action should be instituted. Ex parte investigational hearings may be conducted to determine whether or not a respondent is complying with an order of the Commission; whether it is complying with decrees and suits brought by the United States; and to determine the facts in cases referred by the courts to the Commission as a matter in chancery.

*II. Stipulations to cease and desist*

In certain cases not involving false advertising of dangerous drugs, highly flammable fabrics and wearing apparel, or suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices, respondents are afforded, after investigation, an opportunity to voluntarily agree to cease and desist. The Commission reserves the right to withhold this privilege if it considers it would better serve the public interest to use its formal or involuntary procedures. This determination is made by the Commission upon the recommendation of its staff.

*III. Economic surveys and reports*

General and special economic surveys and investigations are conducted by the Bureau of Economics under authority of the various laws administered by the Commission into the conduct, organization, and business practices of corporations. Determination to make such surveys is made by the Commission on its own initiative or approval of a recommendation of the staff, at the request of the President, at the direction of Congress, or on the application of the Attorney General. Except to the extent that trade secrets and names of customers are involved, the Commission itself determines whether or not it shall publish such surveys and reports, on the basis of what seems to it expedient in the public interest.

*IV. Administration of Wool Products Labeling Act, Fur Products Labeling Act, and Flammable Fabrics Act*

The general administration of these acts is carried out by the Bureau of Investigation through its Division of Wool, Fur, and Flammable Fabrics as described in subpart H of the Commission's rules of practice, procedures, and organization, submitted herewith as exhibit 1. It recommends agency action where necessary. Minor adjustments are usually made administratively, by voluntary action on the part of those subject to the acts. Where inspections reveal violations of a major nature, they are fully investigated by the investigational procedures above described and upon staff recommendation the Commission determines whether or not to institute corrective and remedial procedures in accordance with law.

*V. Export Trade Act administration*

This act provides exemptions to export trade associations from the Sherman and Clayton Acts, to gain and maintain the benefit of which, such association must file with the Commission certain reports. Whenever the Commission has reason to believe such association has violated the act, it summons the association and conducts an investigation and thereafter may proceed correctively under its formal procedures, for violations of the Federal Trade Commission Act, and by application to the Attorney General in cases involving restraints of trade. The Commission also may make to such association recommendations for business readjustment. These determinations are made by the Commission upon the recommendation of its staff.

*VI. Trademark procedure*

Under the Lanham Act the Commission is authorized to initiate procedures for the cancellation of registration of marks which do not conform to the requirements of the act. These proceedings are subject to the rules and regulations of the Commissioner of Patents. Determination of whether or not to institute such applications is made by the Commission upon the recommendation of its staff after investigation.

*VII. Rulemaking procedures*

(a) *Wool, Fur, and Flammable Fabrics Acts.*—Each of these acts authorizes and directs the Commission to prescribe such rules and regulations as may be

necessary and proper to administer and enforce their provisions. Such rules and regulations have the force and effect of law when so prescribed. These rules are promulgated and published in the Federal Register in strict conformity with the requirements of section 4 (Rulemaking) of the Administrative Procedure Act and are to be distinguished from interpretative rules. The content of these rules is determined by the Commission upon the recommendation of its staff after full compliance with all legal requirements, and after affording all interested parties an opportunity to participate.

(*b*) *Quantity limit rules* (*X*)[1].—After investigation the Commission may promulgate quantity limit rules under section 2(a) of the Clayton Act, as amended, where it finds that available purchasers in greater quantities are so few as to render differentials in price on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce. This determination is made by the Commission after due investigation and hearing to all interested parties as provided by the Clayton Act, section 2(a).

(*c*) *Trade practice rules.*—These are designed to eliminate and prevent, on a voluntary and industrywide basis, trade practices and methods of competition in an industry, which would constitute violations of laws administered by the Commission. These rules are interpretative, and do not have the force and effect of law. Violations thereof, if too serious to be adjusted administratively, become the subject of investigation and complaint under the Commission's formal procedures. Proceedings are conducted to determine violations of the statutes and not violations of the rules. Determination whether this latter shall be done is made by the Commission upon the recommendation of its staff.

(*d*) *"Guides" such as guides against deceptive pricing (exhibit 2).*—These are guides for the use of the staff. They are initiated by the Commission upon its own motion. After adoption, they are published in the Federal Register and released to the public in the interest of obtaining voluntary compliance with the law.

(*e*) *Rules of practice and procedure for adjudicative proceedings.*—These are described in part III, page 16 of exhibit 1 and are promulgated and published in the Federal Register after notice pursuant to the provisions of the Federal Trade Commission Act and section 4 of the Administrative Procedure Act. (See exhibit 1, subpart D, p. 15.)

*VIII. Injunctive and condemnation proceedings*

Where it appears that the public may be endangered, before final Commission disposition, application may be made by the Commission to the courts for injunctive relief pursuant to the provisions of section 13 of the Federal Trade Commission Act in relation to harmful food, drugs, devices or cosmetics, and for injunctive relief or condemnation, in cases arising under the Wool, Fur, and Flammable Fabrics Acts. The decision to make such application is made by the Commission upon recommendation of its staff.

*IX. Receipt and filing reports of compliance*

This is a determination made by Commission authority delegated to its General Counsel, in cases where there is no staff difference of opinion nor novel questions, to the effect that on the basis of the facts reported and data submitted in support thereof, it appears that the Commission's order is presently being complied with; if there is a difference of opinion or novel question presented, the determination as to the receipt and filing of a report is made by the Commission itself upon the recommendation of its staff.

*X. Initial determination of violation of final order*

When, after investigation it appears that respondent is violating a cease and desist order of the Commission after the same has become final either by lapse of time without appeal, or by final judicial determination, and, after a reasonable opportunity usually accorded him to voluntarily get into compliance, he fails to do so, a suit for civil penalty is prepared and submitted to the Commission for certification to the Department of Justice seeking statutory penalties for such violations. The only times he is not afforded such an opportunity is where it clearly appears that the violations must be willful and deliberate or that the respondent has been "stalling." If there is a disagreement between the Compliance Division and the respondent as to whether or not the acts persisted in by him are violative of the order, he is given an opportunity to present his views

[1] See answer to question 2, p. 12.

both to the Compliance Division and through the Compliance Division in writing to the Commission for consideration in determining whether it wishes to certify the suit. When certified the Department of Justice then sends the suit to the appropriate U.S. district attorney for filing and the matter is thereafter proceeded with as much or as little assistance from the attorneys of the Compliance Division staff as the U.S. attorney deems desirable.

B. ADJUDICATIVE PROCEEDINGS—FORMAL

*I. Issuance of complaint formally charging respondents with violation of laws administered by the Commission*

*(X) II. Initial decision of hearing examiner after trial*

*III. Initial decision of hearing examiner based on stipulation-consent orders*

*(X) IV. Appeal from decision of hearing examiner*

*(X) V. Oral argument on decision of hearing examiner*

*(X) VI. Decision on appeal or review by the Commission*

*Question No. 2. Which of these final determinations are required by law or by current agency regulation (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?*

Those determinations which are required by law or current regulation to be made on the basis of a record of a hearing at which interested parties are entitled to present their views are indicated on the foregoing list set forth under question No. 1, by an (X) mark.

The regulation applicable to quantity limit rules is on page 13, part II, subpart B.

The regulations applicable to those procedures listed under "Adjudicative proceedings," supra, will be found in sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45 and 52), section 11 of the Clayton Act (15 U.S.C. 21), the Export Trade Act (15 U.S.C. 64), the Wool Products Labeling Act (15 U.S.C. 68), the Fur Products Labeling Act (15 U.S.C. 69) and the Flammable Fabrics Act (15 U.S.C. 1192, 1194, and 1197). The method of making such final determinations is provided by these statutes.

*Question No. 3. In which of the instances listed in question 2 do you make determinations preliminary to the formal hearing in proceedings which are not made a part of the ultimate record on which decision is based?*

The answer is—none.

*Question No. 4. In what cases is it optional with the agency whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views? What are the agency standards used to determine whether a hearing will be held?*

In all of the procedures listed in response to question No. 1, supra, not marked by an (X), there is no option exercised and such determinations are not required to be made solely on the basis of a hearing at which interested parties are entitled to present their views. However, it should be understood that in all nonadjudicative procedures the staff is always ready to hear and usually does hear informally the views of any interested member of the public who cares to present them and full notice and opportunity to consult is given all interested parties prior to the promulgation of "guides,' and trade practice rules (see VII C and D, supra).

The agency standards used to determine whether a hearing will be held are those set forth in the Administrative Procedure Act. In accordance therewith, hearings are held at which interested parties are entitled to present their views in the course of establishing rules under the Wool, Fur, and Flammable Fabrics Act, and trade practice rules. See also subpart D on page 15 of exhibit 1, "Rules of Practice and Procedure" formulated by the Commission with help and advice of its Committee on Administrative Procedure and other advisory groups or parties. It is there provided that any interested person, party, or group may petition for the issuance, amendment, or repeal of any such rule.

*Question No. 5. Which final determinations are by law or by agency regulation (please cite the applicable regulation) not made on the basis of the record of a hearing at which interested parties are entitled to present their views? This list should include all determinations which may be based in part on a hearing but for which the record is not the sole basis of decision.*

All those procedural determinations listed in response to question No. 1 not marked by an (X) are not made on the basis of the record of a hearing, although as above stated, interested parties are always entitled to present their views and such views are given consideration.

The only determinations which are based in part on a hearing but for which the record of the hearing is not the sole basis are trade practice conference rules; wool, fur, and flammable fabrics rules (see exhibit 1, pt. 1).

*Question No. 6. In which of your proceedings do you consider it improper for ex parte communications to be made to the agency?*

It is considered by the Commission improper for ex parte communications to be made to a Commissioner or the hearing examiner in any adjudicative proceeding after issuance and service of a complaint and prior to its determination by the decision of the Commission.

*Question No. 7. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed, but that such communications are proper only if made a matter of public record?*

Answer: None. By this answer is meant that we do not consider it desirable for effective administrative action that ex parte communications be made a matter of public record where ex parte communications are proper. We do not consider ex parte communications proper, whether or not made a matter of public record, in connection with procedural determinations in adjudicative proceedings, after the issuance and service of complaint and prior to the final decision of the Commission.

*Question No. 8. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed and that such communications not be made a matter of public record?*

It is necessary for efficient and administrative action that the Commission receive ex parte communications from its staff and the public and that such communications be privileged and confidential except in matters pending for adjudication by the Commission. Subpart G, section 3.28, page 25 of "Rules of Practice for Adjudicative Proceedings" (exhibit 1) forbids any official or employee or agent engaged in the performance of investigational or prosecuting functions for the Commission, and any party, respondent, or his agent or counsel in that or factually related proceeding to participate or advise ex parte in any decision of the hearing examiner or of the Commission therein. This is in strict conformity with section (c) "Separation of Functions" of section 5 of the Administrative Procedure Act by which ex parte consultations are governed.

*Question No. 9. In answering questions 6, 7, and 8, to what extent would you differentiate between communications of the agency staff to those in the agency having the responsibility for decision, whether initiated by the decisionmaker or by other agency members, and similar communications from those outside of the agency? If you do so differentiate please indicate specifically in what proceedings communications from the agency staff to the decisionmakers (and those of their immediate staff who participate in the process of decision) are highly desirable but should be made a matter of public record, and in which proceedings unrecorded communications should be allowed.*

We consider it proper for the Commission having the responsibility for decision in a case to request and receive ex parte advice from the General Counsel and other members of the staff provided no one of them has been engaged in the performance of investigative or prosecutive functions in that or a factually related case. We do not consider it proper for the hearing examiner or the Commission to consult or receive ex parte advice from anyone outside of the agency with reference to an adjudicatory matter pending before it or him for decision.

Since the Administrative Procedure Act forbids only those officers and employees or agents engaged in the performance of investigative or prosecuting functions in any case or factually related one from participating or advising the Commission in a decision and since it is evident that the Commission when it feels necessary, should otherwise be entitled to consult its legal staff on matters of law and public interest, it is considered here that such advice is permissible, is privileged, and should not be made a matter of public record.

It is considered that section 5(c) of the Administrative Procedure Act prevents the hearing examiner from consulting ex parte any person or party within or without the agency, on any fact in issue. This provision of law has been scrupulously observed.

4. ANSWERS OF FEDERAL POWER COMMISSION

FEDERAL POWER COMMISSION,
*Washington, July 31, 1959.*

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.*

DEAR CHAIRMAN HARRIS: In response to your letter of July 15, there follows, in order, our answers to the questions posed therein.

*Question 1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action; e.g., the proceeding leading to a determination whether enforcement procedures should be invoked.*

*Federal Power Act, part I*

1. Issue licenses for hydroelectric projects.
2. Amend licenses for hydroelectric projects.
3. Issue preliminary permits.
4. Amend preliminary permits.
5. Determine cost of and net investment in licensed projects.
6. Approve transfer of licenses.
7. Accept surrender of licenses.
8. Prescribe rules for protection of life, health, and property with respect to licensed projects.
9. Fix annual charges for licensed projects.
10. Fix charges for headwater benefits.
11. Request Attorney General to enforce or revoke license.
12. Determine net investment for use in event of recapture.
13. On expiration of license, issue new license.
14. Fix compensation for use of project by United States in emergencies.
15. Regulate, in certain cases, rates, charges, services, and security issues of licensees.
16. Approve, in certain cases, execution of contracts of licensees extending beyond term of license.
17. Investigate proposed construction of projects to determine jurisdictional status.
18. Investigate unlicensed projects to determine jurisdictional status.
19. Control and supervise entry, etc., of public lands included in powersite reserves.
20. Approve the exercise of eminent domain by licensees.

*Federal Power Act, part II*

21. Direct interconnection of electric facilities and exchange of energy.
22. Require emergency connections of facilities and generation and transmission of energy.
23. Authorize exportation of electric energy.
24. Authorize sale, lease, merger, etc., of facilities of a public utility.
25. Authorize security issues and control disposition of proceeds.
26. Prescribe regulations for the filing of electric rate schedules.
27. Set hearings on proposed rate changes and suspend change pending such hearing.
28. Pending final determination of lawfulness of rate changes, to authorize collection of increases subject to refund.
29. Determine whether existing rates are just and reasonable.
30. Determine cost of production or transmission of energy by jurisdictional facilities.
31. Require furnishing of adequate service.
32. Ascertain cost of property of public utilities.
33. Refer appropriate matters for hearing to joint boards composed of State commission members.

*Federal Power Act, part III*

34. Prescribe systems of accounts.
35. Determine accounts to which charges and credits shall be made.
36. Require proper depreciation practices and fix rate thereof.
37. Approve officials holding interlocking directorates.
38. Prescribe the filing of reports.
39. Enforce act in the courts.
40. Impose forfeitures on licensees and public utilities for noncompliance with FPA, etc.

*Natural Gas Act*

41. Authorize importation and exportation of natural gas.
42. Prescribe regulations for the filing of gas rate schedules.
43. Set hearings on proposed rate changes and suspend change pending such hearing.
44. Pending final determination of lawfulness of rate changes, to authorize collection of increases subject to refund.
45. Determine whether existing rates are just and reasonable.
46. Determine cost and depreciation of property.
47. Direct extension or improvement of transportation facilities.
48. Direct connection with and sale of gas to local distribution companies.
49. Approve abandonment of facilities or service.
50. Certificate the sale of natural gas or the acquisition, extension, or construction and operation of facilities.
51. Issue temporary certificates to sell, acquire, etc.
52. Determine service areas.
53. Prescribe systems of accounts.
54. Determine accounts to which charges and credits shall be made.
55. Require proper depreciation practices and fix rate thereof.
56. Prescribe the filing of reports.
57. Refer appropriate matters for hearing to joint boards composed of State commission members.
58. Investigate violations of the act.
59. Determine the adequacy of gas reserves.

*Executive Order 10485*

60. Authorize construction and maintenance at the borders of the United States of facilities for the importation and exportation of natural gas and electric energy.

*Other statutes*

61. Approve the rates for the sale by the Secretary of the Interior of surplus energy from the Bonneville, Fort Peck, and certain other Federal projects.

*Question 2. Which of these final determinations are required by law or by current agency regulation (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?*

Hearings are required.

Item 15.[1] In administration of FPA, section 20, parties shall have same rights of hearing, etc., as provided by Interstate Commerce Act for regulation of rates of railroads.

Item 27. Commission under FPA, section 205(e), may order a hearing to determine the lawfulness of a change in rates and after full hearings, make such order as would be proper in a proceeding instituted after the rate had become effective.

Item 29. Commission under FPA, section 206(a) may, after hearing, determine and fix the just and reasonable rate to be thereafter observed and in force.

Item 36. Commission may, after hearing pursuant to section 302(a), FPA, require licensees and public utilities to carry a proper depreciation account and may fix the rate of depreciation.

Item 43. Commission under NGA, section 4(e), may order a hearing to determine the lawfulness of a change in rates and after full hearings, make such

[1] These items refer to answers listed in response to question 1.

order as would be proper in a proceeding instituted after the rate had become effective.

Item 45. Commission under NGA, section 5(a), may, after hearing, determine and fix the just and reasonable rate to be thereafter observed and in force.

Item 49. A hearing is required by section 7(b) of the NGA on applications to abandon facilities or service.

Item 50. Section 7(c) of the NGA requires that hearings be held on applications for permanent certificates authorizing the sale of natural gas or the construction and operation of facilities.

Item 52. Section 7(f) of NGA authorizes the Commission, after hearing, to determine the service area of a certificated company.

Item 56. Commission may, after hearing pursuant to NGA, section 9(a) require licensees and public utilities to carry a proper depreciation account and may fix the rates of depreciation.

Item 58. Section 14(b) of the NGA authorizes the Commission, after hearing, to determine the adequacy of gas reserves and the propriety and reasonableness of the inclusion in operating expenses of delay rentals for unoperated lands or leases.

Opportunity for hearing is required before the Commission can—

Item 3. Cancel a preliminary permit (FPA, sec. 5).

Item 5. Determine fair value of constructed projects licensed pursuant to FPA, section 23(a).

Item 9. Fix annual charges for certain purposes (FPA, sec. 10(e)).

Item 12. Determine net investment in project in event of recapture (FPA, sec. 14).

Item 21. Direct interconnections pursuant to FPA, section 202(b).

Item 23. Deny authority to export electric energy (FPA, sec. 202(e)).

Item 24. Approve sales, leases, or mergers of facilities (FPA, sec. 203).

Item 25. Authorize security issues (FPA, sec. 204).

Item 31. Determine and require the furnishing of adequate service (FPA, sec. 207).

Item 35. Determine accounts in which particular payments and receipts shall be entered (FPA, sec. 301(a)).

Item 40. Impose forfeitures (FPA, sec. 315(a)).

Item 41. Deny importation or exportation of natural gas (NGA, sec. 3).

Item 48. Direct interconnection and sale to local distributing company (NGA, sec. 7(a)).

Item 55. Determine accounts in which particular payments and receipts shall be entered (NGA, sec. 8(a)).

*Question 3. In which of the instances listed in question 2 do you make determinations preliminary to the formal hearing in proceedings which are not made a part of the ultimate record on which decision is based?*

The form of this question is too narrow for Commission practice in this regard applies as equally to proceedings in which no hearing is required by statute or by Commission regulation as to those in which a hearing is required. Incidentally, the Commission has no regulations requiring a hearing where one is not required by statute. ( Cf. response to question 4.)

Furthermore, the question is based upon a premise not applicable to this agency, i.e., that some preliminary proceedings are made a part of the ultimate record on which a decision is based. True it is that some record of the preliminary proceedings may find its way into the ultimate record, but this would be only through normal hearing procedures involving the presentation of testimony or exhibits.

So, in view of the foregoing, any of the functions listed in the response to question 5, below, with respect to which the Commission might decide to hold a hearing, should be included in an answer to this question. With respect to the functions listed in question 2, the following might be included as examples of functions in which preliminary determinations are made:

Items 27 and 43. Determine to hold a hearing with respect to a proposed change in rates and suspend operation of the new rate.

Items 29 and 45. Decide to initiate an investigation into a company's existing rates.

Items 36 and 55. Decide to issue an order directing a company to show cause why it should not conform its depreciation practices to Commission precedent.

Items 49 and 50. Decide to initiate a proceeding to determine the jurisdictional status of persons or companies who, from preliminary investigation, may be subject to the Natural Gas Act.

Item 59. Determine from records in its possession that the gas reserves of a particular company may not be adequate and decide to initiate an investigation.

None of the foregoing preliminary determinations would have any effect, pro or con, upon whatever final decision the Commission might make.

*Question 4. In what cases is it optional with the agency whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views? What are the agency standards used to determine whether a hearing will be held?*

Hearing optional.

Though no hearing is required by statute the Commission has held hearings in connection with many of the proceedings listed in our answer to question 5. In addition, it has, by the rules cited below, provided that a hearing may be held, in its discretion—

(1) On applications for hydroelectric project licenses (18 CFR 4.32);

(2) On applications for preliminary permits (18 CFR 4.83);

(3) On applications for vacation or withdrawal of powersite reservations or for determinations permitting entry, etc., upon such reservations (18 CFR 25.2).

The Commission would hold a hearing—

(1) Whenver, after notice of an application has been given, protests or interventions are filed;

(2) Whenever the subject matter involves great public interest or important questions of law, or where the Commission is of the opinion that a hearing is necessary to enable it to make a decision consonant with the public interest.

*Question 5. Which final determinations are by law or by agency regulation (please cite the applicable regulation) not made on the basis of the record of a hearing at which interested parties are entitled to present their views? This list should include all determinations which may be based in part on a hearing but for which the record is not the sole basis of decision.*

No hearing or opportunity for hearing is required to be held in connection with the following determinations listed in the response to question 1.

Items 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 16, 17, 18, 19, 20, 22, 26, 28, 30, 32, 33, 34, 37, 38, 39, 42, 46, 47, 51, 53, 56, 57, 58, 60, 61.

*Questions 6, 7, 8, and 9.*

In order to furnish information meaningful to the subcommittee, these questions, we feel, should be rephrased so that they are directed to the stages of proceedings rather than proceedings as such. While it may be that there are proceedings which might be categorized under one of these questions, the really important question revolves around the circumstances under which an ex parte communication is made. Also involved is the subject matter of the communication itself. Thus, in an adversary adjudicative proceeding, required by law to be based upon a hearing record, ex parte communications made prior to the commencement of hearing might be permissible if made public (but not included in the hearing record) or, for example, staff communications to the Commission even if not made public.

Contrariwise, in a proceeding of a purely legislative character, such as one leading to the promulgation of a rule or regulation of general applicability, secret ex parte communications to the Commission by one of the class of persons to be affected by the proposed rule might be improper while a similar secret communication made by the staff to the Commission could be not only legally permissible but ethically proper.

It is for these reasons that we feel compelled to the conclusion that the propriety or impropriety of an ex parte communication—and, by the same token, legality or illegality—depends not on the type of proceeding in which it occurs, but on the circumstances under which it is made, the matter to which it refers (i.e., procedural or otherwise) and the party by whom it is made (staff member or outsider).

These considerations make it impossible to answer questions 6, 7, and 8 in the form posed. But these considerations also point up the dilemma facing the subcommittee and the agencies and the practical impossibility of categorizing ex parte communications as proper or improper in particular types of proceedings or even to classify them according to their content, the stage in a proceeding at which they are made or the person by whom made.

In considering the problems raised by the subcommittee's hearings on ethics in Government and the practical operational necessities of the administrative

process, this Commission has, at least, three firm convictions. First, that ex parte communications from its staff cannot be treated wholly in the same manner as those from outsiders. Secondly, that a sharp distinction must be kept between an agency's public record and the hearing record upon which a decision is made. And, thirdly, that the receipt and consideration of ex parte communications is at times not only proper but necessary.

A partial solution to the dilemma may be found in the suggestion we made in our report on H.R. 6774. We there suggested that one remedy would be to allow ex parte communications in writing in all proceedings and to require that they be placed in the agency's public file but that they not be permitted in the hearing record or considered by the hearing examiner or agency members in reaching a decision. Ex parte communications should be prohibited if they are made orally in the class of proceedings where secrecy is improper.

If Congress should require that in specified types of proceedings ex parte communications must be made in writing and must be placed in the public file, with failure to make public disclosures made punishable, two desirable objectives would be achieved: (*a*) There could no longer be any secrecy; (*b*) the formal hearing record upon which the decision in each case must be predicated would be fully protected. This would, among other things, permit the Commission and its staff freedom to obtain information from applicants and others in connection with its determination as to whether a matter should be set for hearing or a rate suspended.

We wish to reiterate our desire to be completely cooperative with the committee in its endeavor to evolve effective and workable legislation, and hope our responses herein will be helpful to that end.

Sincerely yours,

JEROME K. KUYKENDALL, *Chairman.*

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### 5. ANSWERS OF SECURITIES AND EXCHANGE COMMISSION

MEMORANDUM OF SECURITIES AND EXCHANGE COMMISSION IN RESPONSE TO QUESTIONS CONCERNING ITS JURISDICTION AND POWERS IN LETTER FROM HON. OREN HARRIS, MEMBER OF CONGRESS, DATED JULY 15, 1959

***Question 1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action; e.g., the proceeding leading to a determination whether enforcement procedures should be invoked.***

The Securities and Exchange Commission (Commission) administers the following statutes:

The Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a–77aa (1952) (Securities Act);

The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a–78jj (1952) (Exchange Act);

The Public Utility Holding Company Act of 1935, 49 Stat. 838, as amended, 15 U.S.C. 79—79z–6 (1952) (Holding Company Act);

The Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U.S.C. 77aaa–77bbb (1952) (Indenture Act);

The Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U.S.C. 80a–1—80a–52 (1952) (Investment Company Act); and

The Investment Advisers Act of 1940, 54 Stat. 847, as amended, 15 U.S.C. 80b–1—80b–21 (1952) (Advisers Act).

In addition, the Commission also performs an advisory function under chapter X of the Bankruptcy Act, 52 Stat. 883 (1938), as amended, 11 U.S.C. 501–676 (1952) (chapter X).

The procedures set forth in the several statutes mentioned above and the rules, regulatons and orders thereunder, which result in a final determination by the Commission, are set forth in the attachments appended hereto.

(*a*) As to the Securities Act and the Indenture Act see attachments A to F inclusive;

(*b*) As to the Exchange Act and Advisers Act see attachments G to L inclusive;

(*c*) Enforcement actions under all statutes administered are set forth in attachments M and N;

(*d*) As to the Holding Company Act and the Investment Company Act see attachments O and P respectively;

(*e*) A summary statement of the Commission's advisory functions under Chapter X of the Bankruptcy Act is stated in attachment Q.

The summaries of final determinations prepared with respect to the Securities Act, Indenture Act, Exchange Act, and Advisers Act (attachments A to L inclusive) are broken down into three classifications: (1) rule-making, (2) adjudication, and (3) enforcement.[1]

In view of the complexity of the Holding Company Act and the Investment Company Act, as well as their regulatory character, the summaries of those acts are not broken down like the other statutes. Rather, the final determinations are listed seriatim in attachments O and P without regard to classification.

***Question 2. Which of these final determinations are required by law or by current agency regulations (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?***

Securities Act (see attachment C).

Indenture Act (see attachment D).

Exchange Act (see attachment I).

Advisers Act (see attachment J).

*Holding Company Act.*—Under the Holding Company Act various sections specifically require that final determinations by the Commission be made only after notice and opportunity for hearing. At any such hearing a record is made and interested parties are entitled to express their views in accordance with the Commission's Rules of Practice. These sections are: 2(a)(7)(B) first sentence, 2(a)(7)(B) second sentence, 2(a)(8)(B) first sentence, 2(a)(8)(B) second sentence, 2(a)(11)(D), 2(b), 3(c), 7(b), 10(b), 11(b), 11(b)(1), 11(b)(2), 11(d), 11(e), 11(f), 11(g)(2), 13(d), and 15(f).

Section 20(c) provides that orders of the Commission shall be issued only after opportunity for hearing. As a consequence, the Commission has promulgated rule 23 (17 CFR 250.23) which is applicable to transactions subject to various sections of the act which do not specifically require notice and opportunity for hearing. These sections are: 6(a), 7(a), 9(c)(3), 12(b), 12(c), 12(d), 12(e), 12(f), 15(e), and 20(c). Rule 23 is also applicable to rule 42 (17 CFR 250.42) promulgated under section 12(c); to rule 43 (17 CFR 250.43) promulgated pursuant to sections 12(e) and 12(f); to rule 44 (17 CFR 250.44) promulgated pursuant to section 12(d); to rule 45 (17 CFR 250.45) promulgated pursuant to section 12; to rule 46 (17 CFR 250–46) promulgated pursuant to section 12(c); to rule 50 (17 CFR 250.50) promulgated pursuant to sections 6(b), 7, and 12(d); and to rule 65 (17 CFR 250.65) promulgated pursuant to section 12(e). In addition, rule 23 is applicable to declarations regarding proposed accounting entries subject to instruction 8C of the Uniform System of Accounts for Public Utility Holding Companies prescribed by the Commission.

Under the procedure prescribed by rule 23 the Commission publishes in the Federal Register notice of the filing of a declaration or an application. This notice is also published as a Holding Company Act release which is distributed to the Commission's mailing list, to the press and to all persons the Commission believes have an interest in the subject matter of the filing. If the Commission deems that a hearing is appropriate in the public interest or the interest of investors or consumers, whether upon its own motion or at the request of any interested person, the Commission will issue an order for hearing and in that event the declaration or application will not become effective or be granted except pursuant to further order of the Commission. When a hearing is ordered under rule 23, the proceeding is conducted in the same manner as if a hearing had been ordered in accordance with the statutory provisions cited above.

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[1] For the purposes of this questionnaire, the definitions of "rulemaking" and "adjudication" conform to those used in the answer to the questionnaire submitted by the Commission to the Executive and Legislative Reorganization Subcommittee on the House Government Operations Committee on Jan. 15, 1957. (See H. Rept., "Survey and Study of Administrative Organization Procedure and Practice in the Federal Agencies," pt. 11D, "Independent agencies," 1903 et seq.) "Adjudication" for the purposes of this questionnaire also includes adjudicatory action pursuant to rules promulgated by the Commission in addition to adjudication specifically required by statute whether or not opportunity for hearing is provided. "Enforcement" for the purpose of this questionnaire includes all action taken by the Commission under all of the statutes which it administers relating to the institution, conduct, and termination of investigations, court litigation, and administrative proceedings.

The Commission notices cases for hearing, without following the rule 23 procedure, where the matter is to be contested or where it is desirable to have a hearing for other reasons.

*Investment Company Act.*—Section 40(a) of the Investment Company Act provides that orders of the Commission shall be issued only after appropriate notice and opportunity for hearing. Section 41 provides that hearing may be public and appropriate records thereof shall be kept. At all hearings a record is made and interested parties are entitled to express their views in accordance with the Commission's Rules of Practice.

The Commission has adopted rule 0–5 governing the procedure to be followed with respect to any proceeding initiated by the filing of an application, or upon the Commission's own motion, pursuant to any section of the act or any rule or regulation thereunder unless in a particular case a different procedure is provided. Under this procedure the Commission publishes in the Federal Register notice of the initiation of the proceeding. The notice indicates the earliest date upon which an order disposing of the matter may be entered. The notice provides that any interested person may, within a specified time, submit in writing any facts bearing upon the desirability of a hearing on the matter and may request that a hearing be held. An order disposing of the matter will be issued as of course on a date specified in the notice unless prior thereto, the Commission orders a hearing. The Commission will order a hearing if it appears that a hearing is necessary and appropriate in the public interest or for the protection of investors (1) upon the request of any interested person, or (2) upon its own motion. When a hearing is ordered under rule 0–5, the proceeding is conducted in the same manner as if a hearing had been ordered initially.

The Commission notices cases for hearing, without following the rule 0–5 procedure, where the matter is to be contested or where it is desirable to have a hearing for other reasons.

It is to be noted that sections 8(e), 16(b), and 25(b) provide specific procedures for obtaining Commission determinations as indicated in the answer to question 1. (See attachment P.)

*Question 3. In which of the instances listed in question 2 do you make determinations preliminary to the formal hearing in proceedings which are not made a part of the ultimate record on which decision is based?*

No final determinations in the instances listed in answer to question 2 are ever made in preliminary proceedings. The final determinations are always made solely on the basis of the record which has been developed at the hearing. Preliminary discussions, whether on procedural matters or the substance of the proceeding, are frequently held with the staff of the Commission. However, such preliminary discussions play no part in the formal hearing and form no part of the basis upon which the final determination is made. Some examples of determinations which the Commission may make preliminarily are: (*a*) The statutory authority and grounds forming the basis for the proceeding; (*b*) whether the proceedings are to be made public or private; (*c*) who are to be named as parties to the proceedings; and (*d*) specification of any special procedure to be followed during the course of the proceeding.

*Question 4. In what cases is it optional with the agency whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views? What are the agency standards used to determine whether a hearing will be held?*

The Commission cannot deprive any person of a hearing, under any of the statutes administered by it, in those circumstances where the law grants a right to a hearing. As to rulemaking, the discussion of rule XIX of the Commission's Rules of Practice, which appears infra under the Holding Company Act, is applicable to all statutes.

*Securities Act and Indenture Act.*—Neither act specifically provides for discretionary authority with respect to the holding of hearings. Prior to any final determination not required to be made on a record at a hearing, the Commission may order a hearing if deemed to be in the public interest or necessary for the protection of investors, or, upon request, grant a hearing.

*Exchange Act.*—The Commission does not have the option under applicable statutory provisions or regulations to decide whether a final determination will be made on the basis of the record of a hearing at which interested parties are entitled to present their views.

*Holding Company Act.*—All final determinations in the instances listed in the answer to question 2 are made upon the basis of a record, and notice and oppor-

tunity for hearing are in all cases given to the parties and to interested persons. In those cases to which rule 23 is applicable, it is optional with the Commission whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views. However, the notice issued pursuant to rule 23 specified interested parties may request the Commission that a hearing be held. It is the Commission's practice to set down all contested matters for hearing.

In connection with the promulgation of rules and regulations the procedure is governed by the provisions of rule XIX of the Commission's Rules of Practice. That rule provides that any person desiring the issuance, amendment or repeal of a rule may file a petition with the Commission. The rule further provides that except where the Commission finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, whenever the Commission, on its own motion or on the petition of an interested person, proposes to issue, amend or repeal any rule or regulation of general application other than an interpretative rule, general statement of policy, or a rule of agency organization, procedure, or practice, or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, a notice of the proposed action is published in the Federal Register. This notice includes a statement of the times, place and nature of the rulemaking proceeding with particular reference to the manner in which interested persons shall be afforded an opportunity to participate in such proceeding.

The standards which the Commission uses to determine whether a hearing will be held under rule 23 are those contained in the statute, namely, whether "a hearing is appropriate in the public interest or the interest of investors or consumers." In applying these standards the Commission resorts to the statement of congressional policy contained in section 1 of the act and to the specific statutory standards set forth in the various other sections.

The standards which the Commission applies under rule XIX of the Rules of Practice are those contained in both the Holding Company Act and the Administrative Procedure Act.

*Investment Company Act.*—All final determinations in the instances listed in answer to question 2 are made upon the basis of a record, and notice and opportunity for hearing are in all cases given to the parties and to interested persons. Under the procedure adopted under rule 0–5, the notice specifies that interested parties may request the Commission to hold a hearing. It is optional with the Commission whether or not to set down a matter for hearing, but it is the Commission's practice to set down all contested matters for hearing. The standards which the Commission uses to determine whether a hearing will be held are expressed in the rule, to wit, that it appears that a hearing is necessary or appropriate in the public interest or for the protection of investors. The Commission bases its determination upon the provisions of the act and the congressional policy in accordance with section 1 of the act.

In connection with the promulgation of rules and regulations the procedure is governed by the provisions of rule XIX of the Commission's Rules of Practice. That rule is summarized above.

*Question 5. Which final determinations are by law or by agency regulation (please cite the applicable regulation) not made on the basis of the record of a hearing at which interested parties are entitled to present their views? This list should include all determinations which may be based in part on a hearing but for which the record is not the sole basis of decision.*

*Securities Act and Indenture Act.*—All of the proceedings listed in attachments A, B, E, and F may result in final determinations not made on the basis of the record of a hearing at which interested parties may present their views.

*Exchange Act and Advisers Act.*—All of the proceedings in attachments G, H, K, and L may result in final determinations not made on the basis of the record of a hearing at which interested parties may present their views.

*Holding Company Act.*—Except as otherwise provided in rule XIX of the Commission's Rules of Practice as set forth in answer to question 4, the final determinations which the Commission makes and which are not made on the basis of the record of a hearing at which interested parties are entitled to present their views are those in cases subject to rule 23 in which the Commission does not order a hearing. In addition, there are the instances set forth below and identified by the specified sections of the act. The subject matters of such sections are contained in the answer to question 2 above. The sections of the act are: (2)(a)(11)(B); 2(b); 3(a); 3(b); 3(d); 5(a); 5(b); 5(b)(1); 5(b)(2); 5(b)(2)(H); 5(b)(2)(I); 5(b)(3); 5(c); 5(d); 6(b) first and last

sentences; 7(a); 7(a)(1); 7(a)(2); 7(b); 7(c)(1)(B)(iii); 7(c)(3); 9(c)(2); 9(c)(3); 10(a); 10(a)(1); 10(a)(1)(G); 10(a)(2); 10(a)(3); 10(d); 11(a); 11(c); 11(d) first, second, and fourth sentences; 11(e) first and third sentences; 11(f) first, fourth, and fifth sentences; 11(g)(1); 11(g)(2); 11(g)(3); 12(g); 12(l); 13(a); 13(b); 13(c); 13(e); 13(f); 13(g); 14; 15(a); 15(b); 15(c); 15(d); 15(e); 15(f) first sentence; 15(g); 15(h); 15(i); 17(a); 17(b); 17(c); 18(a); 18(b); 18(c); 18(d); 18(f); 18(g); 19; 20(a); 20(b); 20(c); 20(d); 22(a); 22(b); and 30.

*Investment Company Act.*—The final determinations which the Commission makes and which are not made on the basis of the record of a hearing at which interested parties are entitled to present their views are those in cases subject to rule 0–5 in which the Commission does not order a hearing. In rulemaking no hearing is involved where the Commission finds that such procedure is impracticable, unnecessary or contrary to the public interest pursuant to rule XIX of the Rules of Practice of the Commission.

In addition, no record of hearing is made in instances where the Commission determines to bring an action or to take certain steps as indicated in the following sections which have been listed in answer to question 1: Section 14(b), 25(b), 25(c), 26(c), 29(b), 33(b), 35(d), 36, 39, 42(a), 42(c), 42(e), 43(a), 45(b), 46(a), and 46(b).

*Question 6. In which of your proceedings do you consider it improper for ex parte communications to be made to the agency?*

After institution of any proceeding of a quasi-judicial nature it is the practice of this Commission as distinguished from its prosecutory staff, not to discuss matters in such cases with any participant without all others being present, except that the staff is permitted to present offers of settlement ex parte.

Our canon 6 states in pertinent part: "In performing their judicial functions, members should avoid discussion of a matter with any person outside this Commission and its staff while the matter is pending." Absent a waiver, in contested cases the Commission, as more fully set out below, in the preparation of its opinions as assisted by its Opinion Writing Office, an office completely divorced from the operating divisions which appear in administrative proceedings.

Our canon 9, entitled "Ex Parte Communicaions," provides:

"Matters of a quasi-judicial nature should be determined by a member solely upon the record made in the proceeding and the arguments of the parties or their counsel properly made in the regular course of such proceeding. All communications by parties or their counsel to a member in a quasi-judicial proceeding which are intended or calculated to influence action by the member should at once be made known by him to all parties concerned. A member should not at any time permit ex parte interviews, arguments or communications designed to influence his action in such a matter."

Our canon 6, however, recognizes, and we submit properly, that a different approach is appropriate with respect to our quasi-legislative functions. Thus, that canon provides in pertinent part:

"In the performance of his rulemaking and administrative functions, a member has a duty to solicit the views of interested persons. Care must be taken by a member in his relationship with persons within or outside of the Commission to separate the judicial and the rulemaking functions and to observe the liberties of discussion respectively appropriate."

In quasi-legislative matters the Commission informally discusses problems arising out of proposed rules with members of the regulated industry and representatives of professional groups, such as bar associations and accounting societies. We formulate rules upon the basis of our own expertise and after consultation with the staff, and anyone else having an interest or having pertinent information to consider. Our ability to gather all relevant information and to consult with all interested persons in connection with such rulemaking contributes to an intelligent exercise of our quasi-legislative responsibilities. Since in these areas our decision is not and cannot be based exclusively upon the facts in a formal record but rather is based upon the knowledge of the Commission as an institution, however acquired, and since in these areas there are no adversary parties having a right to know of or to rebut all informational material, we favor unrestricted off-the-record communications.

But even with respect to its quasi-judicial functions, the Commission has in appropriate areas and before a hearing is noticed, held informal conferences not of record. For example, in proceedings such as those relating to effecting compliance with statutory standards, as exemplified by the simplification provisions of the Holding Company Act, informal conferences between the Commis-

sion and its staff and the representatives of the companies to be regulated are not only desirable but almost essential. Such practice has had judicial approval. In *Phillips* v. *S.E.C.*, 153 F. 2d 27, at page 32 (C.A. 2, 1946), the court stated:

"These conversations seem to us no more than legitimate prehearing conferences of the kind which the Commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man. Certainly a court would not be justified in interfering with such helpful prelminary conferences to expedite the settlement of details without a very definite showing of prejudice to an approved party or eventual denial of a fair hearing. Here the Commission, as it showed at the hearings, did not hold itself bound by any of the preliminary steps, but gave the final judgment upon its view of the law—which conincides with our own, as we have shown—and in the exercise or a discretion which appears rational and reasonable."

As a matter of fact, the Attorney General's Committee on Administrative Procedure complimented the Commission on being "highly successful in simplifying and diminishing the usual formal litigious process through its conference technique," Senate Document No. 10, 77th Congress, 1st session, part 13, page 41 (1941).[3]

In this response we interpret "the agency" to mean the Commission as distinguished from the prosecuting staff. The prosecuting staff, as a practical matter, must be accessible to any person who has a matter involving the statutes administered by the Commission. This is so even with respect to proceedings of a quasi-judicial nature. However, once any matter has been submitted to the Commission for decision, if the prosecuting staff, by consent, is to participate in the drafting of the Commission decision then, of course, accessibility as to matters relating to the Commission's decision or opinion should end. In other cases, once there has been a submission for decision and the Commission begins its review of the record with the assistance of the Opinion Writing Office, neither the prosecutory staff nor outsiders should have access to either the Commission or the Opinion Writing Office.

*Securities Act, Indenture Act, Exchange Act, Advisers Act.*—In general, in all proceedings under these acts which are of an adjudicatory nature, as defined in footnote 1 at page 195, ex parte communications with the Commission, whether by the staff or by persons outside the agency, would be improper, once the matter has been submitted to the Commission for decision. The only exception would be in those cases wherein the prosecutory staff, by consent, is to participate in the preparation of the Commission decision. The proceedings under these acts to which the foregoing would be applicable are listed in attachments C, D, I, and J.

In rule making, as set forth above, these rigid proscriptions would not be applicable.

*Holding Company Act, Investment Company Act.*—The great majority of procedures under these acts, although they usually involve the issuance of an order by the Commission, may be classified as rulemaking.

In situations where compliance with the provisions of the Holding Company Act or the Investment Company Act is involved, we have generally found that full and frank conferences between representatives of the company and our staff, sometimes held after the institution of the formal proceeding, are helpful in insuring compliance with the statutory standards. Other parties to the proceeding or persons having limited rights of participation have generally not been permitted to attend all such conferences, although our staff has always been

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[3] The report of the Attorney General quoted with commendation from an address made by the late Judge Jerome Frank, then Chairman of the Commission, before the Association of the Bar of the City of New York, in which he said: "In the exercise of its powers to give advance absolution, we on SEC try to approach business problems with informed understanding of business needs and ways. While to be sure, when we consider a case after a hearing and argument, we act quasi-judicially, we and our staff, before a hearing, try to assist the companies and their lawyers, accountants and engineers, so that the facts presented will lend to decisions which are both in accordance with the statute and business-like. In those preliminary discussions, we employ the informal method of roundtable conference. We do not stand on false dignity. We recognize that, although we have official titles, we are still human beings and do not know it all. We do not wear frock coats, and we do not think frock coatedly. We and those with whom we confer think out loud and in the vernacular; we and they put our feet on the table and unbutton our vests. We want to understand and be understood. Ours is a practical problem, a problem to be worked out, under the requirements of the statute, with businessmen. We seek decisions which will carry out the law and yet be workable. We think that that is the best means of bringing about cooperation between government and business."

agreeable to consulting separately with them, if desired. In this manner our staff sometimes acts as an intermediary to achieve settlements of complex financial issues.

Another reason for this approach is that companies hesitate to discuss problems frankly when the discussion might involve divulgence of inside information in the presence of participants who might be tempted to make speculative use of this information. Our staff, of course, is prohibited from trading in securities of the companies over which we have jurisdiction under these statutes. In addition, situations might also arise where the interested division of the Commission and certain security holders would be opposed to an application while the applicant and possibly other security holders would support it. We feel that persons so allied should be able to consult privately as to their strategy in the presentation.

With respect to these acts, once a matter has been submitted to the Commission for decision, any ex parte communication with the Commission or its Opinion Writing Office by either the staff or outsiders would be improper. If, however, the prosecutory staff, by consent, is authorized to assist the Commission in the preparation of its decision then, of course, the prosecutory staff could communicate ex parte.

In rulemaking, when the rule being considered is one of general application, the Commission has permitted persons who comment to elect to request that the comment be nonpublic.

*Question 7. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed, but that such communications are proper only if made a matter of public record?*

In view of the qualification in the last clause, the answer is "none."

*Question 8. In which proceedings do you consider it desirable for effective administration that ex parte communications be allowed, and that such communications not be made a matter of public record?*

Much of what might be stated in response to this question has been set forth in the answer to question 6.

Specifically, however, where the Commission is considering rules of general application it appears to us desirable, within the discretion of the Commission, to permit ex parte, nonpublic communications. The areas involved include those stated in attachment A (Securities Act), B (Indenture Act), G (Exchange Act), and H (Advisers Act). Also, in dealing with proxy material under the Exchange Act, ex parte communications are desirable (attachment K).

Under the Holding Company Act, ex parte communication has received judicial approval in cases under section 11: See *Phillips* v. *S.E.C.* (153 F. 2d 27 (C.A. 2d 1946)). The principles stated in that case are applicable generally to that act and to the Investment Company Act (see discussion in response to question 6). However, in any event, once a matter is submitted to the Commission for decision ex parte communication ceases, except where the prosecutory staff, by consent, is authorized to participate in the decisional process.

*Question 9. In answering questions 6, 7, and 8, to what extent would you differentiate between communications of the agency staff to those in the agency having the responsibility for decision, whether initiated by the decisionmaker or by other agency members, and similar communications from those outside of the agency. If you do so differentiate please indicate specifically in what proceedings communications from the agency staff to the decisionmakers (and those of their immediate staff who participate in the process of decision) are highly desirable but should be made a matter of public record, and in which proceedings unrecorded communications should be allowed.*

When the Commission is considering a rule of general application it is entitled, in its deliberations, to the candid opinions of its staff. Ex parte communications between the Commission and staff are a necessity. In some circumstances the Commission may, in its discretion, permit ex parte nonpublic communication by outsiders.

In enforcement matters including criminal referrals, the Commission is also entitled to the candid opinions of its staff. Consequently, ex parte communications between Commission and staff are a necessity.

The processing of proxy solicitation material, even where there is a proxy contest, as well as securities registration statements, reports, and informal interpretive assistance in regard to proposed transactions are additional examples of procedures wherein ex parte communication between Commission and staff is a necessity. This is so even to the extent of excluding the person whose solicitation material is being processed. However, in a contest, the contending factions

may be accorded ex parte access to the Commission. Since the material of the contending factions is processed in confidence, either or both may be permitted to communicate ex parte to the exclusion of the rival faction.

In its quasi-judicial functions the Commission usually relies upon its Opinion Writing Office to assist it. Sometimes, however, by consent, the prosecutory staff is authorized to assist the Commission. Communication between Commission and the staff members concerned is necessary. For an outsider to communicate ex parte with the Commission after a matter has been submitted to it for decision would be improper. If the prosecutory staff were to communicate ex parte with either the Commission or the Opinion Writing Office with respect to a matter in the decisional process that, likewise, would be improper.

There are other less important instances of ex parte communications by the staff with the Commission which are mentioned in the discussion in response to other questions.

There does not appear to be any compelling reason why any of the ex parte communications specifically mentioned in this response should be a matter of public record. On the contrary, making such communications public would doubtless deprive the Commission of the opportunity for free, full and candid discussion with the staff. Such ex parte communications are usually made in writing. When they are made orally they usually occur during a Commission meeting at which minutes are kept. Therefore, it is not usual that the ex parte communications would be "unrecorded." Although usually recorded, however, they are nonpublic.

In this response we do not differentiate between whether the ex parte communication has been initiated by the Commission or by the staff since, in the instances discussed, it does not appear to be of significance.

RULEMAKING PROCEEDINGS UNDER THE SECURITIES ACT OF 1933

Section 2(10)(b): To permit additional information to be contained in notice, circular, advertisement, letter, or communication in respect of a security not deemed to be a prospectus.

Section 3(b): To add any class of securities to those exempted by section 3 of the act where the aggregate amount at which the issue is offered to the public does not exceed $300,000.

Section 3(c): To add to the securities exempted by section 3 of the act any class of securities issued by a small business investment company under the Small Business Investment Act of 1958.

Section 6(d): To prescribe conditions under which information may be made available to the public and the charges for copies thereof.

Section 7: To prescribe data to be included in a registration statement, and to dispense with consent of certain experts.

Section 10(a)(4): To designate the statements required by section 10(a) which may be omitted from a prospectus as not being necessary or appropriate in the public interest or for the protection of investors.

Section 10(b): To permit summary prospectuses.

Section 10(c): To require that such additional information be contained in a prospectus as is necessary or appropriate in the public interest or for the protection of investors.

Section 10(d): To classify prospectuses according to the nature and circumstances of the use or the nature of the security, issue, issuer, or otherwise, and to prescribe as to each class the form and contents which the Commission may find appropriate and consistent with the public interest and the protection of investors.

Section 10(e): To prescribe rules as to size of type, etc.

Section 10(f): To prescribe rules for the filing of prospectuses which consist of a radio or television broadcast and for the filing with it of forms and prospectuses used in connection with the sale of securities registered under this title.

Section 19(a): To make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including those governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms.

To prescribe the forms in which required information must be set forth, the items or details to be shown in the balance sheet and earning statement, the methods to be followed in the preparation of certain items contained in financial statements including the use of consolidated balance sheets.

*Schedule A*

Item 25: To prescribe the detail and form of balance sheets.

Item 26: To prescribe the detail and form of profit and loss statements and certain other accounting procedures.

To provide for submission of information of the character similar to that of schedule A for certificates of deposits, voting trust certificates, collateral trust certificates, interim or other receipts for certificates, and like securities.

*Schedule B*

Item 5: To prescribe the detail and form of the information in respect to receipts classified by source and expenditures classified by purpose.

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Related to the Securities Act of 1933 is the Bretton Woods Agreement Act (22 U.S.C. 286 et seq.) which in section 15(a) empowers the Commission:

To provide for periodic reports by International Bank for Reconstruction and Development with regard to securities issued by the bank deemed to be exempt securities under section 3(a)(2) of the Securities Act of 1933 and section 3(a)(12) of the Securities and Exchange Act of 1934.

RULEMAKING PROCEEDINGS UNDER THE TRUST INDENTURE ACT OF 1939

Section 304(e): To add to the securities exempted any class of securities issued by a small business investment company under the Small Business Investment Company Act of 1958.

Section 305(a)(1): To prescribe the information and documents to be included in the registration statement so that the Commission may be enabled to determine whether a designated person is eligible to act as a trustee under an indenture pursuant to section 310(a) or has a conflicting interest as defined in section 310(b).

Section 305(c): To prescribe supplementary analysis of specified indenture provisions to be included in prospectus in respect of securities required to be registered under the Securities Act of 1933.

Sections 306(b)(1); 306(b)(2): To prescribe supplementary analysis of specified indenture provisions to be included in statement accompanying prospectus or securities or to be included in prospectus in respect of securities not required to be registered under the Securities Act of 1933.

Section 307(a): To prescribe the form, the manner of signature, and the information to be included in an application for qualification of an indenture, where registration is not required under the Securities Act of 1933 but to which section 306(a) applies; to prescribe the rules for making copies available.

Section 307(b): To prescribe medium of payment.

Section 308(a): To permit incorporation by reference of the documents on file under this title or the Securities Act, the Securities Exchange Act, or the Public Utility Holding Company Act.

Section 308(b): To provide for consolidation of applications, reports, and proceedings under the various acts.

Section 314(a)(1): To prescribe which portions of the annual report, or other reports or documents required by sections 13 and 15(d) of the Securities Exchange Act of 1934 must be filed by the obligor with the indenture trustee; for obligors which are not subject to such sections, to prescribe the information, documents and reports which are to be filed with the Commission and the indenture trustee.

Section 304(a)(3): To provide for the transmission to the indenture security holders of summaries of any of the information, documents, and reports required to be filed pursuant to section 314(a)(1) and 314(a)(2).

Section 319(a): To make, issue, amend, and rescind rules and regulations as it deems necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used therein.

To prescribe (1) for the purposes of section 310(b) the method of calculating percentages of voting securities and other securities; (2) for the definitions of the terms "cash transaction" and "self-liquidating paper" and the creditor relationships referred to in section 311(b)(4) and (6); and (3) the form in which information required in any statement, application, report or other document filed with the Commission shall be set forth.

To classify persons, securities, indentures, and other matters within its jurisdiction and prescribe different requirements.

Section 319(b): To prescribe the manner in which its rules and regulations shall be published and the time when they become effective, subject to the provisions of the Federal Register Act.

SECURITIES ACT OF 1933

Adjudicatory proceedings under the Securities Act of 1933 in which a final determination is required by law or agency regulation to be made on the basis of a record of a hearing at which interested parties are entitled to present their views.

Section 8(b): Orders prior to effective date of registration refusing to permit such statement to become effective.

Section 8(d): Stop orders suspending effectiveness of registration statement.

Section 10(b), rules 434, 434A: Orders vacating or modifying orders suspending or preventing use of summary prospectuses.

Section 3(b), regulation A, rule 261; regulation B, rule 340; regulation B–T, rule 380; regulation F, rule 656: Orders making permanent or vacating temporary suspension orders.

Section 3(c), regulation E, rule 610; schedule A, item 30, rule 485: Orders denying application for nondisclosure of material contract provision.

TRUST INDENTURE ACT OF 1939

Adjudicatory proceedings under the Trust Indenture Act of 1939 in which a final determination is required by law or current agency regulation to be made on the basis of a record of a hearing at which interested parties are entitled to be heard.

Section 304(c)(1), rule 4c–4: Orders granting or denying applications for exemption from any one or more provisions of the act.

Section 304(c)(2): Orders granting or denying applications for exemption from any one or more provisions of the act.

Section 304(d): Orders granting or denying applications for exemption from any one or more provisions of the act.

Section 305(b): Orders refusing to permit registration statement to become effective.

Section 305(c): Orders causing supplementary analysis of specified indenture provisions prepared by the Commission to be included as a part of the prospectus.

Section 307(c): Orders suspending effectiveness of registration statement.

Section 310(b)(1)(i): Determination that trustee has conflict of interest made by order pursuant to section 305(b) or section 307(c).

Section 310(b)(1)(ii): Orders granting or denying applications for a determination that the trusteeship under the indenture to be qualified and another indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify the trustee.

Section 312(b): Orders sustaining or refusing to sustain objections of trustee, or declaring that sustained objections have been met. Rule 10b–3: Determination on applications relative to affiliation between trustees and underwriters.

SECURITIES ACT OF 1933

Other adjudicatory proceedings under the Securities Act of 1933:

Section 3(b):

Rule 240(d): To waive certain conditions for use of exemption from registration under regulation A–M.

Rule 242(f): To waive certain conditions for use of exemption from registration under regulation A.

Rule 255: To authorize a shorter period of time after filing of notification under regulation A to commence public offering.

Rule 256(f): To authorize a shorter period of time for use of amended offering circular under regulation A after filing.

Rule 258: To authorize a shorter period of time for use of sales material after filing.

Rule 261: To suspend exemption under regulation A.

Rule 324: To refuse to accept for filing under regulation B any list of persons on whose behalf an offering sheet is filed if such list contains the names of any persons who are not registered as dealers under section 15 of the Securities Exchange Act of 1934.

Rule 340: To suspend exemption under regulation B.

Rule 350: To consent or deny consent to withdrawal of offering sheet under regulation B.

Rule 354: To permit amendment to offering sheet to become effective under regulation B.

Rule 356: Order terminating effective date of offering sheet under regulation B.

Rule 380: To suspend exemption under regulation B–T.

Rule 390: To consent or to deny consent to withdrawal of prospectus under regulation B–T.

Rule 394: To permit amendment to prospectus under regulation B–T to become effective.

Rule 651: To waive certain conditions for use of exemption from registration under regulation F.

Rule 652: To authorize a shorter period of time after filing of notification under regulation F to commence public offering.

Rule 654: To authorize a shorter period of time for use of sales material after filing.

Rule 656: To suspend exemption under regulation F.

Section 3(c):

Rule 604(a): To authorize a shorter period of time after filing of notification under regulation E to commence public offering.

Rule 604(c): To authorize a shorter period of time for filing of any amendment to a notification under regulation E.

Rule 605(e): To authorize a shorter period of time after filing of amended offering circular under regulation E for its use.

Rule 610: To suspend exemption under regulation E.

Section 7:

Rule 437: To consent to dispense with the written consent of any person named in the registration statement as having prepared or certified a report or valuation.

Rule 446: To require filing of any documents omitted from filing pursuant to this rule.

Section 8(a) rule 475: Acceleration of effective date of registration statement. To consent to filing of amendment to registration statement.

Section 8(c): Determination of date upon which an amendment filed after the effective date of a registration statement shall become effective.

Section 8(d): Order lifting stop order.

Section 8(e): To authorize an examination to determine whether a stop order should issue under section 8(d).

Rule 477: Granting or denying application for withdrawal of registration statement or any amendment or exhibit thereto.

Section 10(b):

Rule 434, 434A: To suspend or prevent the use of summary prospectus.

Rule 434A(g): To authorize a shorter period of time for use of summary prospectus after filing thereof.

Schedule A, item 30, rule 485: To grant application for nondisclosure of material contract provisions.

Form S–1, instruction 13 to financial statements: To permit the omission of one or more of the financial statements required or to the filing in substitution therefor of appropriate statements of comparable character. To require the filing of additional financial statements.

Other adjudicatory proceedings under the Trust Indenture Act of 1939:

Section 305(b): Order rescinding refusal order.

Section 307(c): Acceleration of effective date of application for qualification of indentures. Determination of date upon which an amendment filed after the effective date of an application for qualification of an indenture shall become effective.

Rule 7a–7: Consent to filing of an amendment to application for qualification of indenture.

Rulemaking proceedings under the Securities Exchange Act of 1934:

Section 3(a)(11): To add to the definition of equity securities.

Section 3(a)(12): To add to definition of exempted securities.

Section 3(b): To define technical trade and accounting terms.

Section 6(a): To prescribe the form of an exchange registration statement.

Section 6(a)(2): To prescribe data to be included in an exchange registration statement.

Section 8(b): To provide for the net capital requirement of brokers or dealers.

Section 8(c): To provide conditions under which certain members, brokers, and dealers may hypothecate customers' securities.

Section 9(a)(6): To permit stabilization, etc., of securities prices.

Section 9(b): To permit puts, calls, straddles, or other options.

Section 9(c): To permit guarantees, etc., of puts, calls, straddles, or other options by exchange members.

Section 10(a): To prohibit stop-loss orders and short sales.

Section 10(b): To define manipulative or deceptive devices in connection with the purchases or sales of securities.

Section 11(a): To regulate floor trading and excessive trading by members of registered exchanges.

Section 11(b): To restrict the activities of odd lot dealers and specialists and to regulate disclosure of information in the possession of specialists.

Section 12 (b) and (c): To provide the form and contents of applications for registration of securities on national securities exchanges.

Section 12(d): To permit unissued securities to be registered.

Section 12(f): To suspend unlisted trading privileges for classes of securities, and to exempt securities which have unlisted trading privileges from provisions of sections 13, 14, or 16 of the act.

Section 13(a): To prescribe information in periodic reports and the copies which must be filed, and to require certification of financial statements contained therein.

Section 13(b): To prescribe the form of periodic reports.

Section 13(c): To require different types of reports for specified classes of issuers.

Section 14(a) and (b): To regulate the solicitation of proxies in respect of securities registered on a national securities exchange.

Section 15(b): To prescribe information in registration applications of brokers and dealers.

Section 15(c)(1): To define fraudulent, manipulative, or deceptive devices by brokers and dealers.

Section 15(c)(2): To define and prescribe means designed to prevent fraudulent, manipulative, or deceptive practises and fictitious quotations by brokers and dealers.

Section 15(c)(3): To provide safeguards with respect to the financial responsibility of brokers and dealers.

Section 15(d): To provide for periodic reports by issuers under the Securities Act of 1933 who are required to undertake to file supplementary and periodic information, and to exempt securities not comprehended within the purposes of this subsection.

Section 15A(a): To prescribe the form of registration statements for associations of brokers or dealers and data to be contained therein.

Section 15A(f): To prescribe forms of notice of withdrawal of registered associations of brokers or dealers.

Section 15A(j): To provide for filing of changes of the rules of registered associations of brokers or dealers.

Section 16(b): To exempt transactions of insiders from recovery of short-term profits where not comprehended within the purpose of the subsection.

Section 16(d): To subject foreign or domestic arbitrage transactions to provisions respecting short-term profits.

Section 17(a): To require the keeping of records and submission of reports by persons regulated.

Section 23(a): To adopt rules and regulations as may be necessary for the execution of the functions vested in the Commission by the act.

Section 24(b): To make information available to the public and fix the price to be charged therefor.

Section 30(a): To restrict brokers' or dealers' transactions on foreign exchanges.

Section 30(b): To prohibit the transacting of business in securities outside the United States where it is conducted for the purposes of evasion of the act.

Rulemaking proceedings under the Investment Advisers Act of 1940:

Section 202(a)(11): To exempt persons not within the meaning of the act.

Section 203(c): To prescribe the form and content of applications for registration with certain limitations.

Section 204(a): To prescribe forms for annual and special reports by investment advisers.

Section 210(a): To exempt from public disclosure information in applications for registration and in reports filed by investment advisers.

Section 211: To adopt rules and regulations as are necessary or appropriate for the exercise of powers conferred by the act.

Adjudicatory Proceedings under the Securities Exchange Act of 1934 (15 U.S.C., secs. 78a–78jj) in which a final determination is required by law or by current agency regulation to be made on the basis of a record of a hearing at which interested parties are entitled to present their views:

Section 6(e): To deny registration of an exchange as a national securities exchange.

Section 12(f): (1) To continue or extend unlisted trading privileges to a security; and (2) to terminate or suspend unlisted trading privileges.

Section 15(b): To revoke or to deny registration as a broker-dealer upon finding that denial or revocation is in the public interest and that certain statutory disqualifications exist; to suspend or to expel from membership in a national securities association or a national securities exchange.

To postpone the effective date of broker-dealer registration until final determination on the question of denial of registration.

To suspend broker-dealer registration if such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors, pending final determination whether any broker-dealer registration shall be revoked.

Section 15A(e): To deny the registration of a national securities association.

Section 15A(h)(1): To affirm or dismiss an order entered by a registered securities association in a disciplinary action by such association against a member thereof.

Section 15A(h)(3): To review the denial of membership in a registered securities association.

Section 15A(k)(1): To abrogate any rule of a registered securities association, if it appears to the Commission such abrogation is necessary or appropriate to assure fair dealing by members and otherwise to protect investors.

Section 15A(k)(2): To alter or supplement the rules of a registered securities association as to certain specified matters.

Section 15A(l)(1): To suspend or revoke the registration of a registered securities association for violation of the act or rules thereunder, the failure to enforce compliance with its own rules, or other activity tending to defeat purposes of section 15A.

Section 15A(l)(2): To suspend or expel a member from a registered securities association upon finding that such member is subject to certain statutory disqualifications.

Section 15A(l)(3): To remove from office any disqualified officer or director of a registered securities association.

Section 19(a)(1): To suspend or withdraw the registration of a national securities exchange for violation of the act or the rules and regulations thereunder, or for failure to enforce compliance therewith by a member or an issuer of a security registered thereon.

Section 19(a)(2): To deny, suspend the effective date of, suspend, or withdraw the registration of a security if the issuer has failed to comply with the act or the rules and regulations thereunder.

Section 19(a)(3): To suspend or expel any officer or member of a national securities exchange who has violated any provision of the act or the rules and regulations thereunder, or who has effected any transaction for any person he has reason to believe is violating the act or the rules and regulations thereunder.

Section 19(b): To alter or supplement the rules of a national securities exchange in respect of certain matters enumerated in this section.

Section 24(b) rule 24(b)(2): To sustain objections to nondisclosure of material contract provisions in certain cases.

Adjudicatory proceedings under the Investment Advisers Act of 1940, in which a final determination is required by law or by current agency regulations to be made on the basis of a record of a hearing at which interested parties are entitled to present their views:

Section 203(d): To deny, suspend, or revoke the registration of an investment adviser if subject to certain statutory disqualifications.

Section 211(c): To issue any order.

Other adjudicatory proceedings under the Securities Exchange Act of 1934, or the rules and regulations adopted thereunder:

Section 5: To exempt an exchange from registration where, because of the limited volume of transactions on such exchange, registration is not practicable.

Section 6(e): To declare effective the registration of a national securities exchange.

Rule X-6A-1(d): To request an exchange to file a new registration statement.

Section 6(f): To permit an exchange to withdraw its registration.

Rule X-10B-2(d)(2): To declare an exchange distribution plan effective.

Rule X-10B-6(f): To exempt transactions from rule X-10B-6.

Rule X-10B-7(o): To exempt transactions from rule X-10B-7.

Rule X-10B-8(f): To exempt transactions from rule X-10B-8.

Section 11(c): To exempt an exchange and its members from the provisions of section 11 (a) and (b) and the rules adopted thereunder when the limited volume of transactions on the exchange make application of such provisions impracticable and unnecessary.

Rule 12b-25: To grant or deny extension of time for filing required information, documents, or reports.

Section 12(d): (1) To accelerate the effectiveness of the registration of a security on an exchange; and (2) to impose terms on the withdrawal of registration of a security.

Rule X-12F-2(b): To determine that a security after changes is substantially equivalent to a security theretofore admitted to unlisted trading privileges.

Section 14:

Rule 14a-11(e): To authorize a shorter period of time for filing of preliminary copies of proxy solicitation material than that prescribed by the rule.

Rule 14a-8: To permit filing of objection to inclusion of stockholders' resolutions in management proxy statement within a shorter period of time than that prescribed by the rule.

Rule 14a-11: To permit filing of information specified by schedule 14B within a shorter period of time than that prescribed by the rule; in the case of additional filings, a longer period of time.

Section 15(b): To accelerate effective date of application for registration as a broker-dealer—to defer the effective date of the registration of a broker-dealer until the 30th day after the filing of an amendment to the application for registration, where the amendment is filed before registration becomes effective.

To postpone the effective date of broker-dealer registration not more than 15 days, pending final determination whether registration shall be denied.

To impose such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors upon withdrawal of broker-dealer registration.

To cancel registration as a broker-dealer or of an application for registration as a broker-dealer if such broker-dealer is no longer in existence or has ceased to do business as a broker-dealer.

Rule X-15C3-1: To suspend or withdraw the exemption of members of an exchange from the net capital rule.

Section 15A(b)(4): To approve or direct the admission to or the continuance in membership of a member of a national securities association in certain cases where such member or any controlling or controlled person of such member is subject to certain disqualifications.

Section 15A(h)(2): To cancel, reduce, or require the remission of a penalty imposed upon a member by a national securities association.

Rule X-17A-6: To declare effective a plan by an exchange to destroy or dispose of certain records filed pursuant to the act.

Section 19(a)(4): To suspend trading summarily for a period not exceeding 10 days in any security registered on a national securities exchange, or with the approval of the President, to suspend summarily all trading for a period not exceeding 90 days on any national securities exchange.

Section 24(b), rule 24b-2: To afford confidential treatment to an application, report or document filed with the Commission.

* * * * * * *

In addition to the sections and rules of the Securites Exchange Act specifically enumerated as a part of this attachment K, all of the proceedings listed in attachments G and H, supra, and L, M, and N, infra, may result in final determinations not made on the basis of a record of a hearing at which interested

parties may present their views under both the Securities Exchange Act and the Investment Advisers Act.

Other adjudicatory proceedings under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1–21), or the rules and regulations adopted thereunder:

Section 202(a)(11)(F): To exempt certain persons from inclusion in the definition of investment adviser.

Section 203(e): To postpone the effective date of registration as an investment adviser for not more than 3 months.

Section 203(g): To impose terms and conditions upon withdrawal from registration as an investment adviser.

To cancel the registration or application for registration of an investment adviser who the Commission finds is no longer engaged in business as an investment adviser.

Enforcement procedures relating to investigations and litigation arising under the statutes administered by the Commission which are final determinations:

1. *Formal orders of investigation.*—The Commission determines whether its power to issue subpenas and administer oaths in connection with an investigation should be delegated to staff members through a formal order for investigation. Section 19(b) and 20(a), Securities Act of 1933; section 21(b), Securities Exchange Act of 1934; section 18(c), Public Utility Act of 1935; section 321(a), Trust Indenture Act of 1939; section 42(b), Investment Company Act of 1940; and section 209(b), Investment Advisers Act of 1940.

The Commission thereafter decides whether to take further action or to close any investigation in which it has issued a formal order of investigation or has authorized enforcement action.

2. *Subpena enforcement.*—The Commission decides whether it should apply to a United States court for an order requiring compliance with a Commission subpena directed to a person who has refused to appear or produce evidence. Section 22(b), Securities Act; section 21(c), Securities Exchange Act; section 18(d), Public Utility Act; section 321(a), Trust Indenture Act; section 42(c), Investment Company Act; section 209(c), Investment Advisers Act; and section 6(c), Administrative Procedure Act.

3. *Granting immunity.*—The Commission determines whether a person who has claimed privilege against self-incrimination in a private investigation or in an administrative proceeding shall be compelled to testify or furnish evidence. A person so compelled may not be prosecuted on account of any matter concerning which he has been compelled to testify or furnish evidence, except for perjury in so testifying. Section 22(c), Securities Act; section 21(d), Securities Exchange Act; section 18(e), Public Utility Act; section 321(a), Trust Indenture Act; section 42(d), Investment Company Act; and section 209(d), Investment Advisers Act.

4. *Disclosure of information.*—(*a*) The Commission decides whether a witness who has testified in a private investigation may obtain a copy of the transcript of his testimony. Section 6(b), Administrative Procedure Act; rule XX, Commission Rules of Practice; rule 122, Securities Act; rule X–4, Securities Exchange Act; rule U–104, Public Utility Act; and rule T–O–6, Trust Indenture Act.

(*b*) The Commission determines whether a member of the staff may disclose to any person, except a member, officer or employee of the Commission, information obtained in the course of a private investigation. Rule 122, Securities Act; rule X–4, Securities Exchange Act; rule U–104, Public Utility Act; and rule T–O–6, Trust Indenture Act.

5. *Civil litigation.*—(*a*) The Commission determines whether to institute action in the appropriate U.S. courts to enjoin violations of the acts. Section 20 (b) and (c), Securities Act; section 21 (e) and (f), Securities Exchange Act; section 18 (f) and (g), Public Utility Act; section 321(a), Trust Indenture Act; sections 36 and 42(e), Investment Company Act; and section 209(e), Investment Advisers Act.

(*b*) The Commission decides whether an action instituted by it may be disposed of on any basis other than a judgment and decree for the full relief sought in the action.

6. *Contempts.*—The Commission determines whether civil or criminal contempt actions should be initiated by it against a person who fails to comply with the terms of court orders entered in actions instituted by the Commission.

7. *Criminal referrals.*—The Commission decides whether evidence concerning violations as a result of its investigations should be referred to the Attorney General for criminal prosecution. Section 20(b), Securities Act; section 21(e),

Securities Exchange Act; section 18(f), Public Utility Act; section 321(a), Trust Indenture Act; section 42(e), Investment Company Act; and section 209(e), Investment Advisers Act.

Enforcement procedures relating to administrative proceedings under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 which are final determinations:

1. *Administrative proceedings generally.*—The Commission determines whether to institute those proceedings under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 listed in attachments G, H, I, J, K, and L (except those proceedings that must be instituted by individual companies or applicants), and determines the grounds upon which such proceedings are to be based.

2. *Broker-dealer proceedings.*—(*a*) The Commission determines whether proceedings under section 15(b) of the Securities Exchange Act to revoke, suspend or deny the registration of a broker-dealer, to suspend or expel from membership in a national securities association or from a national securities exchange; or under section 203(d) of the Investment Advisers Act of 1940 to revoke, suspend or deny the registration of an investment adviser, are to be public or private proceedings.

(*b*) The Commission determines which persons are to be named as causes of any sanctions that may be imposed in such proceedings.

3. *Motions, etc.*—The Commission rules on various motions and procedural applications made during the course of hearings. Rules IV, V, and VI, Rules of Practice.

4. *Offers of settlement.*—The Commission determines whether to accept an offer of settlement made by an interested party during the course of any adjudicatory proceeding listed in attachments I and J. Section 5(b), Administrative Procedure Act.

Public Utility Holding Company Act of 1935:

Listed below are the instances, and the procedures leading thereto, in which the Commission makes final determinations under the Holding Company Act.

Section 2(a)(3): Upon application or by rules or regulations the Commission may declare that certain classes of companies may not be deemed electric utility companies. The Commission may condition its order granting an application so as to require periodic applications for the renewal of such order. Upon its own motion or upon application the Commission has power to revoke such order.

Section 2(a)(4): Upon application or by rules or regulations the Commission may declare that certain classes of companies may not be deemed gas utility companies. The Commission may condition its order granting an application so as to require periodic applications for the renewal of such order. Upon its own motion or upon application the Commission has power to revoke such order.

Section 2(a)(7)(B), first sentence: The Commission may on its own motion declare a person to be a holding company irrespective of stock ownership.

Section 2(a)(7)(B), second sentence: Upon application the Commission may declare that a company is not a holding company. As a condition to an order granting such application the Commission may require periodic applications for renewal of such order. Upon its own motion or upon application the Commission may revoke or modify the terms of such order.

Section 2(a)(8)(B), first sentence: The Commission may on its own motion declare a person to be a subsidiary company irrespective of stock ownership.

Section 2(a)(8)(B), second sentence: Upon application the Commission may declare that a company is not a subsidiary company. As a condition to an order granting such application the Commission may require periodic applications for renewal of such order. Upon its own motion or upon application the Commission may revoke or modify the terms of such order.

Section 2(a)(11)(D): The Commission may determine that any person or class of persons should be subject to the obligation, duties, and liabilities of affiliates of a company.

Section 2(b): The Commission may determine the appropriate method of publication of its determination of affiliates in accordance with section 2(a)(11)(D). On its own motion or upon application the Commission may revoke an order declaring a person to be a holding company, subsidiary company, or affiliate.

Section 3(a): By rules and regulations, upon its own motion or by order, upon application the Commission may exempt certain holding companies and subsidiaries, as such, from any provisions of the act.

Section 3(b): By rules and regulations, upon its own motion, or by order upon application the Commission may exempt any subsidiary company, as such, from any provisions of the act.

Section 3(c): On its own motion or upon application the Commission may revoke exemption orders, entered under sections 3(a) or 3(b).

Section 3(d): By rules and regulations the Commission may conditionally or unconditionally exempt specific classes of persons from the requirements of the act imposed on subsidiaries or affiliates and may provide to the extent determined appropriate that such specific classes shall not be deemed subsidiaries or affiliates.

Section 5(a): By rules and regulations the Commission may prescribe the form of notification of registration for holding companies.

Section 5(b): By rules and regulations or order the Commission may prescribe the time and form for the filing of registration statements by registered holding companies.

Section 5(b)(1): By rules and regulations or order the Commission may prescribe the documents to be included in the registration statement.

Section 5(b)(2): By rules and regulations or order the Commission may prescribe the form and details and necessary documents regarding registered holding companies and their associate companies to be included in the registration statement.

Section 5(b)(2)(H): By rules and regulations the Commission may require certification by an independent public accountant of balance sheets contained in registration statements.

Section 5(b)(2)(I): By rules and regulations the Commission may require certification by an independent public accountant of profit and loss statements contained in registration statements.

Section 5(b)(3): By rules and regulations or order the Commission may prescribe further information or documents to be included in registration statements.

Section 5(c): By rules and regulations or order the Commission may permit registered holding companies to file preliminary registration statements and to fix the time for filing complete registration statements.

Section 5(d): Upon application the Commission may find that a registered holding company has ceased to be a holding company and so declare by order.

Section 6(b), first sentence: Upon application the Commission may permit a registered holding company or subsidiary to issue, renew, or guarantee certain short-term notes and drafts in excess of 5 percent of the principal amount and par value of the company's other outstanding securities.

Section 6(b), third sentence: By rules and regulations or order subject to such terms and conditions as it deems appropriate the Commission may exempt securities of certain subsidiaries from the provisions of sections 6(a) and 7 of the act.

Section 6(b), last sentence: By rules and regulations or order the Commission may prescribe the information to be contained in the certificates of notification required to be filed by the issuer of any security exempt from section 6(a).

Section 7(a): By rules and regulations the Commission may prescribe the form of the declaration required to be filed by registered holding companies and subsidiaries regarding transactions in their securities.

Section 7(a)(1): By rules and regulations or order the Commission may prescribe which of the information and documents required to register a security under section 7 of the Securities Act of 1933 should be included in a declaration.

Section 7(a)(2): By rules and regulations or order the Commission may prescribe such additional information in such form and detail and such documents regarding the declarant or any associate company, the particular security, and compliance with such State laws as may be applicable, to be included in the declaration.

Section 7(b): By rules and regulations or order the Commission may prescribe the time within which the declaration shall become effective. It may require the declarant to show cause why the declaration should become effective. The Commission has power to permit a declaration to become effective as filed or as amended and may prescribe terms and conditions upon which a declaration may be amended.

Section 7(c)(1): The Commission must determine whether to make the findings required by section 7(c) in order to permit a declaration to become effective.

Section 7(c)(1)(B)(iii): By rules and regulations or order the Commission may prescribe the type of assets which can secure securities issued pursuant to section 7(b).

Section 7(c)(3): By rules and regulations or order the Commission may authorize the issuance and sale of securities of registered holding companies or subsidiaries which the issuer was authorized prior to January 1, 1935, to issue.

Section 7(d): The Commission is authorized to make findings which would preclude a declaration from becoming effective.

Section 7(e): The Commission is authorized to make findings which would prevent the exercise of a privilege or right to alter the priorities, preferences, voting powers, or other rights of the holders of an outstanding security.

Section 7(f): The Commission may impose terms and conditions in an order permitting a declaration to become effective.

Section 7(g): The Commission need not permit a declaration to become effective when informed by a State commission having jurisdiction that State laws have not been complied with unless the Commission is satisfied that compliance has been effected.

Section 9(c)(2): By rules and regulations the Commission may prescribe the kind and amount of marketable securities which registered holding companies or subsidiaries may acquire without approval of the Commission.

Section 9(c)(3): By rules and regulations or order the Commission may prescribe the kind of, and limitations on, commercial paper and other securities which may be acquired by registered holding companies or subsidiaries in the ordinary course of business without approval by the Commission.

Section 10(a): By rules and regulations the Commission may prescribe the form of application required to be filed by a person who seeks approval of the acquisition of securities or utility assets or of any other interest in any business.

Section 10(a)(1): By rules and regulations or order the Commission may prescribe the type of information and documents to be included in an application for the acquisition of securities.

Section 10(a)(1)(G): By rules and regulations the Commission may require the certification by an independent public accountant of balance sheets and profit and loss statements to be included in an application for the acquisition of securities.

Section 10(a)(2): By rules and regulations or order the Commission may prescribe the information required in an application for the acquisition of utility assets.

Section 10(a)(3): By rules and regulations or order the Commission may prescribe the type of information required to be contained in an application for the acquisition of any other interest in any business.

Section 10(b), first sentence: The Commission has the power to determine whether to make the findings specified in this section for refusing to permit a proposed acquisition of securities, utility assets, or of any other interest in any business.

Section 10(b), second sentence: The Commission may condition its approval of the acquisition of securities of another company upon a fair offer to purchase other securities of such company.

Section 10(c)(2): The Commission has the power to prevent the acquisition of securities or utility assets of a domestic public utility or a domestic holding company if the Commission does not determine that the proposed acquisition meets the standards of section 11.

Section 10(d), first sentence: By rules and regulations or order the Commission can determine the time after which an application under section 10 will be granted or denied.

Section 10(d), second sentence: The Commission may prescribe terms or conditions upon which an application may be amended.

Section 10(e): By order the Commission may prescribe terms or conditions in respect to an acquisition of securities or utility assets.

Section 10(f): The Commission may determine not to approve an acquisition pursuant to an application if the Commission is not satisfied that applicable State laws have been complied with unless the Commission determines that such compliance would be detrimental to the carrying out of section 11 of the act.

Section 11(a): The Commission has the duty and the power to conduct examinations of registered holding company systems to determine what action should be taken to effect compliance with section 11(b).

Section 11(b)(1): By order the Commission may require a registered holding company and its subsidiaries to take action which the Commission finds necessary to meet the integration requirements of this section.

Section 11(b)(1), proviso: The Commission may permit a registered holding company to control additional integrated public utility systems if it makes the determinations required by subparagraphs (A), (B) and (C) of this section.

Section 11(a)(1), second sentence: The Commission may permit the retention of an interest in any business (other than the business of a public utility company as such) if it makes the determinations required by this section.

Section 11(b)(2): By order the Commission may require a registered holding company and its subsidiaries to take such steps as the Commission finds necessary to achieve the simplification requirements of this section.

Section 11(b)(2), penultimate sentence: By order the Commission may revoke or modify orders previously made under section 11(b) if it determines that the conditions upon which the initial order was predicated do not exist.

Section 11(c): Upon a showing by the applicant that it will be unable in the exercise of due diligence to comply with an order under section 11(b), the Commission may extend the time for compliance for another year if it determines such extension would meet the standards of section 11(c).

Section 11(d), first sentence: The Commission may determine to apply to a court to enforce an order under section 11(b).

Section 11(d), second sentence: The Commission may determine whether it desires to accept appointment by an enforcement court as a trustee.

Section 11(d), third sentence: The Commission may determine whether a reorganization plan proposed by a trustee is fair and equitable.

Section 11(d), fourth sentence: The Commission may propose a plan for the purpose of section 11(d). By rules and regulations the Commission may define a person having a bona fide interest for the purpose of proposing a plan.

Section 11(e), first sentence: By rules and regulations or order the Commission may provide for the submission and approval of plans filed by registered holding companies and subsidiaries for compliance with section 11(b).

Section 11(e), second sentence: The Commission may determine whether a plan is necessary to effectuate section 11(b) and fair and equitable to the persons affected by the plan, and the Commission, at the request of the company, may apply to a court to enforce such plan.

Section 11(e), third sentence: The Commission may accept appointment by an enforcement court as a trustee to carry out a plan.

Section 11(f), first sentence: The Commission may accept appointment as a trustee or receiver by a court of the United States whether under section 11(f) or otherwise for any registered holding company or subsidiary, and the Commission has the right to be heard by the court before any person other than the Commission is appointed as such trustee or receiver.

Section 11(f), third sentence: The Commission has power to determine whether to approve any plan of reorganization.

Section 11(f), fourth sentence: The Commission may propose a reorganization plan and by rules and regulations may prescribe the manner pursuant to which any person having a bona fide interest (as defined by the Commission's rules and regulations) may propose a plan.

Section 11(f), fifth sentence: By rules and regulations or order the Commission may require that fees and expenses in connection with a reorganization shall be subject to approval by the Commission.

Section 11(g)(1): The Commission may require the furnishing of any information it deems necessary regarding any plan or its sponsor, in the event a plan is filed by a person having a bona fide interest (as defined by the Commission's rules and regulations).

Section 11(g)(2): The Commission may determine the nature of its report or an abstract thereof which must be prepared for submission to persons solicited in connection with a reorganization as specified in section 11(g).

Section 11(g)(3): By rules and regulations or orders the Commission may prescribe requirements for solicitations in reorganization proceedings involving registered holding companies and subsidiaries.

Section 12(b): By rules and regulations or orders the Commission may prescribe the standards for permitting extensions of credit or indemnifications within a registered holding company system.

Section 12(c): By rules, regulations, or orders the Commission may prescribe the standards for the payment of dividends by registered holding companies and their subsidiaries and the carrying out of transactions in their own securities.

Section 12(d): By rules, regulations, or orders the Commission may prescribe the standards for permitting the sale by registered holding companies of securities which they own of public utility companies or of utility assets.

Section 12(e): By rules, regulations, or orders the Commission may prescribe the standards for permitting the solicitation of proxies regarding any security of a registered holding company or a subsidiary.

Section 12(f): By rules, regulations, or orders the Commission may prescribe standards for permitting the carrying out of any transactions between companies in the same holding company system or with any affiliates of such companies.

Section 12(g): By rules, regulations, or orders the Commission may prescribe standards with respect to the carrying out of any transactions by any public utility company with any affiliates thereof.

Section 12(i): By rules, regulations, or order the Commission may prescribe forms required to be filed by persons engaging in any lobbying activities enumerated in this section.

Section 13(a): By rules, regulations, or order the Commission may conditionally or unconditionally permit the rendering of services by registered holding company otherwise prohibited by this section.

Section 13(b), first sentence: By rules, regulations, or order the Commission may prescribe terms and conditions and limitations and prohibitions regarding the rendering of services by any subsidiary company of a registered holding company or by any mutual service company to any associate company of such subsidiary or mutual company.

Section 13(b), second sentence: By rules, regulations, or order the Commission may directly or indirectly exempt service transactions from the limitations of this section if the Commission determines the prerequisites enumerated in this section are satisfied.

Section 13(c): By rules, regulations, and orders the Commission may prescribe the standards for rendering of service to classes of companies and by classes of service as specified by the Commission.

Section 13(d): By rules, regulations, and orders the Commission may prescribe terms and conditions upon which applications may be made for approval of mutual service companies, for the granting and continuance of such approval, and may prescribe standards for the carrying out of transactions between mutual service companies and members and affiliates.

Section 13(d), second sentence: The Commission may determine whether the manner in which a mutual service company is organized and conducting its business is offering a reasonable saving to member companies over the cost to such companies of comparable services performed by independent persons.

Section 13(d), third sentence: Upon its own motion or at the request of a member company or of a State commission the Commission may require the equitable reapportionment of costs among member companies or the elimination of any services to a member company which does not bear its fair proportion of cost or which by reason of its size or other circumstances does not require such services.

Section 13(d), fourth sentence: The Commission may revoke, suspend, or modify the approval of any mutual service company if the Commission determines that there has been a violation of this section or any rules, regulations, or order thereunder.

Section 13(e): By rules, regulations, or orders, the Commission may prescribe the standards for the rendering of services by any affiliate to a public utility company or registered holding company or subsidiaries thereof.

Section 13(f): By rules, regulations, or orders the Commission may prescribe the standards for the rendering of services to registered holding companies or subsidiary companies or public utility companies by any person whose principal business is rendering services to public utility or holding companies.

Section 13(g), first sentence: The Commission for the purpose of recommending further legislation may conduct investigations regarding the rendering of services to holding companies, subsidiary companies, and public utility companies.

Section 13(g), second sentence: The Commission may make reports to Congress regarding such investigations with its recommendations for legislation.

Section 13(g), third sentence: On the basis of such investigations the Commission may classify the different types of services and make recommendations regarding such services in relation to public utility companies of different kinds and sizes and the costs incurred thereunder and the economies resulting therefrom; such recommendations may be made available to State commissions, public utility companies, and to the public in such form and at such reasonable charge as the Commission may prescribe.

Section 14: By rules, regulations, or order the Commission may prescribe for registered holding companies and mutual service companies the forms and reports required to be filed with the Commission and whether they should be certified by an independent public accountant.

Section 15(a): The Commission may prescribe the accounts required to be kept by registered holding companies and subsidiaries.

Section 15(b): The Commission may prescribe the accounts to be kept by affiliates of registered holding companies and subsidiaries.

Section 15(c): The Commission may prescribe the accounts required to be kept by mutual service companies and affiliates thereof.

Section 15(d): The Commission may prescribe accounts required to be kept by every person whose principal business is the performance of services for a public utility or holding company.

Section 15(e): The Commission may approve the keeping of accounts in any manner other than as prescribed by the Commission.

Section 15(f), first sentence: The Commission may prescribe the manner in which it or any member thereof may examine any accounts required by the Commission to be kept by any person.

Section 15(f), second sentence: The Commission may prescribe the manner of accounting for particular items and may require entries to be modified or supplemented so as properly to show the cost of any asset or any other cost.

Section 15(g): The Commission may prescribe the manner in which the holders of any security of a registered holding company, subsidiary company, or affiliate may examine the books and records of such companies.

Section 15(h): The Commission may prescribe the manner in which books of a mutual service company may be examined by member companies and public utility or holding companies for which said persons perform services.

Section 15(i): By rules and regulations the Commission may prescribe uniform systems of accounts for persons subject to the provisions of sections 15 (a), (b), (c), or (d).

Section 17(a): The Commission may prescribe the forms required to be filed by officers or directors of registered holding companies regarding their ownership of securities of such holding companies or subsidiaries.

Section 17(b): By rules and regulations the Commission may exempt transactions by officers or diretcors of registered holding companies and their subsidiaries from the act's provisions concerning short-swing profits.

Section 17(c): By rules and regulations the Commission may exempt specified persons from the restrictions imposed upon them by this section which otherwise prevent them from being officers or directors of registered holding companies or subsidiaries.

Section 18(a), first sentence: The Commission may institute and conduct investigations to determine whether any persons have violated or are about to violate the act and the rules and regulations thereunder, or to aid in the enforcement of the act, or, in prescribing rules and regulations, or to obtain information to recommend further legislation.

Section 18(a), second sentence: The Commission may require persons to file statements in writing regarding any subject matter of investigation.

Section 18(a), third sentence: The Commission may publish or make available to State commissions information obtained in investigations.

Section 18(b): Upon its own motion or at the request of a State commission the Commission may investigate any registered holding company or companies in the same system regarding their business, financial conditions, or practices.

Section 18(c): Any member of the Commission or any officer designated by it is empowered to administer oaths, to issue subpenas and take evidence.

Section 18(d): The Commission may invoke the aid of any court of the United States to enforce the Commission's subpenas.

Section 18(f), first sentence: The Commission may bring an action in the U.S. courts to enjoin violations of the act and to enforce compliance with its rules and regulations or orders thereunder.

Section 18(f), second sentence: The Commission may make criminal reference reports concerning such violations to the Attorney General.

Section 18(g): The Commission may appeal to the U.S. courts for the issuance of writs of mandamus commanding any person to comply with the provisions of the act or any rules, regulations, or order thereunder.

Section 19, first sentence: The Commission or any member or members thereof or any officer designated by it may hold hearings.

Section 19, second sentence: By rules and regulations the Commission may prescribe for the admission of parties to proceedings before it.

Section 20(a), first sentence: The Commission may make, issue, amend, and rescind such rules, regulations, and orders as it deems necessary to carry out the act including rules and regulations defining accounting, technical, and trade terms used in the act.

Section 20(a), second sentence: The Commission may prescribe the forms in which information required to be filed with the Commission shall be set forth, the manner of presenting information and financial statements filed with the Commission, and the accounts required by the Commission to be kept.

Section 20(b): The Commission may impose requirements regarding accounting in addition to those imposed by the provisions of any law of the United States or of any State.

Section 20(c), first sentence: The Commission may prescribe the manner in which its rules and regulations shall be published.

Section 20(c), second sentence: The Commission may classify persons and matters for the purpose of its rules, regulations, or orders.

Section 20(d): By rules, regulations, or order the Commission may authorize incorporation by reference of any information required to be filed with the Commission under this act, the Securities Act of 1933, or the Securities Exchange Act of 1934.

Section 22(a): The Commission may determine what information filed with it may be disclosed to the public.

Section 22(b): Upon written objection the Commission may determine not to make such information available to the public.

Section 23: The Commission may include in its annual report to Congress such information, data, and recommendations for further legislation as the Commission may find advisable.

Section 24(a): Upon order of a U.S. court of appeals the Commission may hear additional evidence and based thereon may modify findings of fact previously made in any proceeding which is the subject of review before such court.

Section 30, first sentence: The Commission is authorized to make studies and investigations of public utility companies and to make public recommendations as to the type and size of geographically and economically integrated public utility systems which can best promote and harmonize the interests of the public, investors, and consumers.

### INVESTMENT COMPANY ACT OF 1940 (15 U.S.C. SECS. 80a–1, 80a–52)

Listed below are the instances, and the procedures leading thereto, in which the Commission makes final determinations under the Investment Company Act.

Section 2(a)(9): The Commission by order either on its own motion or on application by an interested person may determine whether a company or a natural person shall be presumed to be a controlled person within the meaning of the act and may revoke or modify such order if no longer consistent with the facts.

Section 2(a)(19): The Commission may by rules and regulations or order determine that a person is not an investment adviser within the meaning of the act.

Section 2(a)(36): The Commission may designate by rules and regulations certain commercial securities which shall be classified as short-term paper.

Section 2(a)(39): The Commission by rules and regulations may determine the time as of which asset values are to be determined and shall permit valuations of securities at cost or other basis for convenience or necessity in complying with other laws. The Commission may by rules and regulations or orders, permit any security to be carried at cost when the assets thereof are not subject to the limitation provided for in section 5(b)(1).

Section 3(b)(2): The Commission upon application by an issuer may declare such issuer to be primarily engaged in a business other than that of an investment company and therefore not an investment company within the meaning of section 3(a)(3). Extension of temporary exemption under this section may be granted by the Commission. The Commission upon its own motion or upon application may revoke an order under this paragraph.

Section 6(b): The Commission shall, upon application by any employees' security company, exempt by order such company from the Investment Company Act to the extent consistent with protection of investors.

Section 6(c): The Commission, by rules and regulations, upon its own motion or by order upon application may conditionally or unconditionally exempt persons, securities, or transactions from any provision of the act.

Section 6(d): The Commission, by rules and regulations or order, shall exempt small intrastate closed end investment companies from any or all provisions of the act.

Section 6(e): The Commission may condition exemptions so as to make certain provisions of the act applicable to nonregistered investment companies. Such determination is made in connection with rules and regulations or orders.

Section 7(d): The Commission may, upon application, permit a foreign investment company to register under the act and to make a public offering of its securities.

Section 8(a): The Commission shall, by rule and regulation, prescribe the form for notification of registration under the act.

Section 8(b): The Commission shall, by rules and regulations, fix the time for filing and prescribe the form of and information to be furnished in a registration statement.

Section 8(c): The Commission shall, by rules and regulations or orders, permit the use of documents and information filed under other statutes in lieu of forms prescribed under the Investment Company Act.

Section 8(d): The Commission may, by rules and regulations or orders, prescribe for a unit investment trust a registration statement which eliminates certain duplication of information.

Section 8(e): If it appears to the Commission that a false registration statement or report has been filed or a required statement or report has not been filed, the Commission shall notify the company by registered mail and fix a date for the filing of such statement or report or to correct the same. If not filed or corrected within the time fixed, the Commission may, after notice and opportunity for hearing, suspend or revoke by order the company's registration.

Section 8(f): The Commission on its own motion or upon application shall so declare by order if it finds that a registered investment company has ceased to be an investment company. Upon the taking effect of such order the company's registration ceases to be in effect. The denial of applications under this subsection must be by order.

Section 9(b): The Commission, upon application for exemption, shall by order exempt persons ineligible to act in certain capacities by reason of section 9(a) if certain facts are established.

Section 10(e): The Commission may prescribe by rules and regulations upon its own motion or by order upon application extensions of time during which certain provisions concerning the eligibility of directors may be suspended.

Section 10(f): The Commission by rules and regulations upon its own motion or by order upon application may exempt transactions from the prohibition against investment companies purchasing certain securities during the existence of an underwriting syndicate where there is an affiliation between the two.

Section 11(a): The Commission may approve the terms of an exchange offer submitted to it although the basis of the exchange is other than the relative net asset values. The Commission may prescribe rules and regulations in respect of such exchange offers.

Section 12(a): The Commission may prescribe rules and regulations or orders regulating margin purchases, joint trading accounts, and short sales.

Section 12(b): The Commission may prescribe rules and regulations regulating the distribution by an open end company of its securities other than through an underwriter.

Section 12(g): The Commission may, by order, exempt the acquisition by an investment company or a controlled company of the stock of an insurance company if it finds the financial condition thereof will be improved.

Section 14(a): The Commission may issue a stop order suspending the effectiveness of a registration statement under the Securities Act of 1933 and may suspend or revoke the registration of the company under the Investment Company Act, if the company does not raise net worth required by this subsection within 90 days in an offering made pursuant thereto.

Section 14(b): The Commission may make a study and investigation of the effects of size of investment companies on their investment policy, on the security markets and other matters, and report the results to the Congress.

Section 16(a): The Commission may by order extend the 60-day period for holding of a stockholders' meeting to fill certain vacancies as required by section 16(a).

Section 16(b): The Commission may by order sustain or refuse to sustain written objections of the trusts to the mailing of certain material to shareholders or may by order declare such objections to have been met.

Section 17(b): The Commission shall by order, grant exemption of transactions of affiliated persons, promoters, and underwriters from the prohibitions of section 17(a) regarding the sale and purchase of securities and other property to and from a registered investment company and controlled companies and the borrowing of money or other property from such companies.

Section 17(d): The Commission may prescribe rules and regulations covering joint transactions in which affiliates of an investment company or a principal underwriter for such company and the company are participants.

Section 17(e)(2): The Commission may by rules and regulations or order permit larger brokerage commission than specified in this paragraph in the purchase and sale of securities.

Section 17(f): The Commission may prescribe rules and regulations for stock exchange member firms acting as custodian of portifolio securities of an investment company, and may prescribe rules and regulations or orders for safekeeping procedures when investment companies maintain their portfolio securities in their own custody. Such rules, regulations, and orders may provide, among other matters, for inspection by employees and agents of the Commission and such other persons as it may designate.

Section 17(g): The Commission may require by rules and regulations or orders for the bonding of officers and employees who have access to the securities or funds of investment companies.

Section 18(f): The Commission may prescribe by rules and regulations periods of time in excess of 3 days in which open-end companies must reduce bank borrowings when asset coverage falls below 300 percent.

Section 18(i): The Commission may permit by rules, regulations, or orders exceptions from the requirement that shares of stock issued by a management company must be voting stock with equal voting rights.

Section 18(j)(1): The Commission may prescribe rules, regulations, or orders to permit face-amount companies to issue securities other than those specified in this paragraph.

Section 18(j)(2): The Commission may prescribe rules and regulations or orders governing the declaration, distribution, or payment of dividends by a face-amount company having certain outstanding securities.

Section 19: The Commission may prescribe by rules and regulations the form of written statements disclosing the source of dividend payments if not from income.

Section 20(a): The Commission may prescribe, by rules and regulations, requirements for the solicitation of proxies, consents, or authorizations.

Section 22(c): The Commission may make rules and regulations applicable to principal underwriters of, and dealers in, redeemable securities regarding their sale and redemption.

Section 22(e): The Commission may by order permit redemption of redeemable securities to be postponed for more than 7 days. The Commission shall by rules and regulations determine the conditions under which trading is restricted on the New York Stock Exchange and the existence of an emergency for purposes of permitting postponement of redemption for more than 7 days.

Section 22(f): The Commission may prescribe rules and regulations concerning restrictions on the transferability or negotiability of securities of open-end companies.

Section 23(b): The Commission may permit by rules and regulations or orders the sale of closed-end company common stock below net asset value.

Section 23(c)(1): The Commission may designate by rules and regulations or orders open markets other than securities exchange for repurchase of its securities by a closed-end company.

Section 23(c)(3): The Commission may permit by rules and regulations or orders the repurchase of securities in a manner other than permitted by sections 23(c)(1) and 23(c)(2).

Section 24(a): The Commission shall designate by rules and regulations the information and documents filed under the Investment Company Act which may be filed in lieu of information and documents required under the Securities Act of 1933 and such additional information and documents as necessary or appropriate.

Section 24(c): The Commission may prescribe by rules and regulations or order the forms and order of items in any prospectus of a periodic payment plan

or face-amount certificate and may require summaries of the information concerning such securities to be contained in such prospectus.

Section 24(d): The Commission may prescribe by rules or regulations the extent and terms and conditions under which a transaction involving a security issued by a face-amount certificate company, open-end company, or unit investment trust may be exempt under the third clause of section 4(1) of the Securities Act of 1933.

Section 24(e)(3): The Commission may prescribe by rules or regulations the circumstances under which a prospectus relating to securities of a face-amount company, open-end company or unit investment trust, which varies, for purposes of section 10(a)(3) of the Securities Act of 1933, from the latest prospectus filed for such securities, may be deemed to meet the requirements of section 10 of the Securities Act of 1933.

Section 25(b): The Commission may render an advisory report in respect of the fairness of a plan of reorganization if requested by an investment company or the holders of 25 percent of any class of its securities, unless the fairness or feasibility of the plan is in issue before a court and the plan has not been submitted to the Commission for an advisory report by such court.

Section 25(c): The Commission may institute proceedings on behalf of security holders in the Federal district court to enjoin the consummation of any plan of reorganization upon the grounds that the plan is grossly unfair or constitutes gross misconduct or gross abuse of trust on the part of officers, directors, or investment advisers.

Section 26(a)(2)(C): The Commission may prescribe a maximum reasonable fee for administrative services performed by a depositor or principal underwriter for a unit investment trust.

Section 26(c): The Commission may file a complaint seeking liquidation of an inactive unit investment trust in the Federal district court.

Section 27(a)(5): The Commission may prescribe maximum management fees for a management company issuing periodic payment plan certificates.

Section 27(a)(6): The Commission may prescribe maximum reasonable fees for a depositor or principal underwriter of a unit investment trust whose assets consist of securities of a management company, where such fees are payable by the management company or any affiliated person.

Section 27(b): The Commission is authorized by rules and regulations to grant exemptions to smaller periodic payment plans from the provisions of sections 27(a)(1), (2), and (3) regulating sales loads.

Section 28(a)(2)(g): The Commission may prescribe by rule, regulation, or order appropriate contingency reserves for death and disability benefits and for reinstatement rights or face-amount certificates providing for such benefits or rights.

Section 28(b): The Commission may authorize by rule, regulation, or order investments as "qualified investments" for face-amount companies other than those permitted under the Code of the District of Columbia for life-insurance companies.

Section 28(c): The Commission shall require by rule, regulation, or order the deposit with a qualified bank of the investments of a face-amount company maintained to meet its certificate reserve requirements.

Section 28(d): The Commission may provide by rules and regulation or orders for deferments in payments on face-amount certificates in addition to those permitted by section 28(d).

Section 28(h): The Commission may by order forbid the declaration, distribution, or payment of any dividend by a face-amount company which does not maintain the certificate reserves required by section 28 under certain circumstances.

Section 29(b): The Commission must be given an opportunity by the court to be heard on the appointment of a trustee in bankruptcy.

Section 30(b): The Commission may require the filing of information on a semiannual or quarterly basis to keep current the registration statement of an investment company.

Section 30(c): The Commission shall issue rules and regulations permitting the filing with the Commission and securities exchanges copies of reports filed under the Investment Company Act in lieu of reports required under the Securities Exchange Act of 1934.

Section 30(d): The Commission may prescribe rules and regulations concerning the financial contents of the reports required to be transmitted to stockholders of investment companies semiannually.

Section 30(e): The Commission may prescribe rules and regulations requiring financial statements to be certified by independent public accountants, such certificate to contain such information as the Commission may prescribe and to state that securities owned have been verified by actual examination or certificate from the custodian as the Commission may prescribe.

Section 31(a): The Commission may prescribe by rules and regulations the accounts, books, and other documents to be maintained by investment companies and by investment adviser, depositors, and principal underwriters, and the period of time the same shall be preserved.

Section 31(b): The Commission may by order require copies or extracts of accounts, books, and records maintained and preserved pursuant to section 31(a) and may prescribe periodic, special, and other examinations by the Commission, or any member or representative thereof, of such books and records.

Section 31(c): The Commission may issue rules and regulations providing for uniformity in accounting policies and principles.

Section 31(d): The Commission upon application may by order exempt a specific transaction from any rule or regulation made under section 31(c).

Section 32(c): The Commission may, by rules and regulations or orders, require accountants and auditors to keep reports, worksheets, and other documents for such period as the Commission may prescribe and the Commission or any member or representative may inspect same.

Section 33(b): The Commission may make a study of the settlement of stockholder actions and may report upon same.

Section 34(a): The Commission may, by rule, regulation, or order, authorize the destruction of documents required to be preserved pursuant to section 31(a) or 32(c).

Section 35(d): The Commission may by order declare any word used in a name or title of a company or a security to be deceptive or misleading. The Commission may bring an action in the Federal district court upon the grounds that the name or title of an investment company or any of its securities is deceptive or misleading. If the allegations in such action are established the court shall enjoin such company from continuing to use such name or title.

Section 36: The Commission may bring an action in the Federal district court alleging that an officer, director, member of an advisory board, investment adviser, depositors, or principal underwriter of an investment company is guilty of gross misconduct or gross abuse of trust. If the Commission's allegations are established the court shall enjoin such person from acting in such capacity.

Section 38(a): The Commission may make, amend, and rescind such rules and regulations and such orders necessary to the exercise of the powers conferred upon the Commission under the act, including rules and regulations defining accounting, technical, and trade terms and prescribing forms for documents to be filed with the Commission.

Section 38(b): The Commission may, by rules and regulations or orders, permit the incorporation by reference of any information with the Commission under the act or other acts administered by the Commission.

Section 39: The Commission may prescribe the manner in which its rules and regulations shall be published subject to the provisions of the Federal Register Act.

Section 40(a): Orders of the Commission shall be issued only after appropriate notice and opportunity for hearing. The Commission shall give notice to parties by personal service or by registered mail or confirmed telegraphic notice and may give notice to interested persons in the same manner or by publication in the Federal Register.

Section 40(b): The Commission may, by rules and regulations, provide that an application verified under oath may be admissible in evidence in a proceeding before the Commission and that the record in such proceeding may consist, in whole or in part, of such application.

Section 40(c): The Commission may, by rules and regulations, admit in any proceeding as a party any State or State agency, any representatives of interested security holders, or any other person.

Section 41: The Commission may hold public hearings before itself, any member thereof or any officer designated by it.

Section 42(a): The Commission may make investigations to determine whether any person has violated or is about to violate the act or any rule, regulation or order thereunder, or to determine whether any action or proceeding shall be instituted. The Commission shall permit any person to file with it a written

statement as to the matter being investigated, under oath or otherwise, as the Commission shall determine.

Section 42(b): Any member of the Commission or any officer designated by it may administer oaths, issue subpenas and take evidence.

Section 42(c): The Commission may invoke the aid of a Federal court to enforce the Commission's subpena.

Section 42(e): The Commission may bring an action in the Federal district court to enjoin any violation of the act or the rules, regulations or orders thereunder and to enforce compliance with the act or any rule, regulation or order thereunder. The Commission may transmit evidence concerning any violation of the act, or of any rule, regulation or order thereunder, to the Attorney General for the institution of criminal proceedings.

Section 43(a): The Commission shall certify and file in the Appellate Court a transcript of the record in connection with a petition for review of a Commission order. The Commission may modify its findings if additional evidence is ordered to be taken before the Commission by the appellate court and shall file with the court such modified or new findings.

Section 45(a). The Commission, by rule and regulation upon its own motion or by order upon application, may exempt certain information filed with it from public disclosure.

Section 45(b): The Commission may prescribe limitations and fix fees respecting the furnishing of copies of documents filed with it and available to the public.

Section 46(a): The Commission may include in its annual report to the Congress such information, data, and recommendations for further legislation as it may find advisable.

Section 46(b): The Commission may select, employ, and fix the compensation of certain experts as shall be necessary in the transaction of its business.

*Chapter X of the Bankruptcy Act (11 U.S.C. 501–676) and chapter XI of the Bankruptcy Act (11 U.S.C. 728)*

As distinguished from the six statutes administered by the Commission relating in general to the field of securities and finance, the Commission is also charged with certain functions of a purely advisory nature relating to corporate reorganizations under chapter X and XI of the Bankruptcy Act. Under chapter X the Commission in certain circumstances has the duty and, in others, a discretionary power to serve as adviser to the Federal courts in connection with the reorganization of debtor corporations. Briefly, under section 172 (11 U.S.C. 572), if the scheduled indebtedness of a debtor does not exceed $3 million, the judge may, and shall, if such indebtedness exceeds $3 million, submit to the Commission for examination and report any plan or plans of reorganization which the judge regards as worthy of consideration. However, the Commission has discretion whether to file such a report and if it does, the report is advisory only. In the event the Commission files a report and the plan, as to which such report is filed, is approved by the judge, section 175 (11 U.S.C. 575) requires that the Commission's report or a summary thereof prepared by the Commission be transmitted to all creditors and stockholders affected by such plan at the time the plan is submitted for acceptance.

Under section 208 (11 U.S.C. 608), the Commission is required, if requested by the judge, and may upon its own motion if approved by the judge, file a notice of its appearance in a chapter X proceeding. Upon the filing thereof, the Commission becomes a party in interest with the right to be heard on all matters arising in the proceeding, except that the Commission has no right to appeal. It has been the usual practice of the Commission to participate in only such proceedings, under chapter X, as involve a substantial public investor interest, or where the judge has requested the Commission's participation, or where important issues relating to the administration of chapter X are presented.

To facilitate the Commission's participation and to assist in rendering advisory services to the courts and other parties, the Commission has stationed expert representatives in various field offices who are available for consultation by those interested in any particular proceeding. The headquarters office is staffed with experts who keep abreast of all chapter X proceedings in the country and who also are available for consultation and advice.

When the Commission enters a proceeding, it participates as any other party through its attorneys. However, all positions which the Commission takes on legal matters are the recommendations of the Commission itself speaking either through its attorneys or through its formal advisory reports. It has never been

the Commission's practice, nor is it required under the Bankruptcy Act, to make its determinations regarding any position it might take in a chapter X proceeding (whether in the reorganization courts or as an appellee in the higher courts) other than on an ex parte basis. In the reorganization of the Third Avenue Transit Corp. in the southern district of New York, where the Commission filed a formal advisory report, a stockholder unsuccessfully attacked such report as having been prepared by the Commission without affording the persons affected by the plan of reorganization a hearing. It was the Commission's position that the contents of its reports and its positions on legal questions are not properly the subject of hearing but rather are to be determined on the basis of the record made before the courts and the applicable legal precedents. There have been occasions, however, where as a matter of discretion the Commission and the staff have, on an informal basis, heard interested parties who sought to persuade the Commission to take particular positions on various legal issues.

The Commission also has standing under section 328 of chapter XI (11 U.S.C. 728) to make application, and to receive notice of applications filed by others, to have a proceeding brought under chapter XI dismissed in the event the judge finds that the proceeding should have been brought under chapter X. Section 328 is a codification of the holding by the U.S. Supreme Court in *S.E.C.* v. *U.S. Realty Co.*, 310 U.S. 434 (1940), that the Commisssion has standing to protest evasion of the Commission's responsibilities and functions under chapter X by improper resort to chapter XI.

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6. ANSWERS OF FEDERAL COMMUNICATIONS COMMISSION

AUGUST 1, 1959.

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight,*
*House of Representatives, Washington, D.C.*

DEAR CONGRESSMAN HARRIS: This is in reply to your letter of July 15, 1959, which contained a request for information regarding agency procedures and our views on the propriety of ex parte communications in various types of proceedings. The information sought is, as you are aware, detailed and comprehensive, and we have been as yet unable to prepare responses to all nine of the questions posed which would be sufficiently complete to be of use to the subcommittee. By way of a partial reply I am forwarding as an attachment the information which has been prepared thus far in response to questions 1 through 5. The remaining material will be supplied as soon as possible. I might suggest that to some extent the Commission's answers to the remaining questions would parallel the agency's comments on H.R. 4800 which were recently submitted to the House Committee on Interstate and Foreign Commerce. For convenience, a copy of this document is also enclosed.

Sincerely yours,

JOHN C. DOERFER, *Chairman.*

RESPONSE TO QUESTION 1

The response to this question utilizes the dichotomy of the Administrative Procedure Act, rulemaking and adjudication, with the latter term applied to all agency processes other than rulemaking. In addition, adjudication is considered in terms of those processes in which an evidential hearing is held and those which become final without a hearing.

*Rulemaking*

Agency proceedings in this category would include those conducted according to the procedures set forth in section 4(b) of the Administrative Procedure Act (5 U.S.C. 1001 et seq.), those conducted pursuant to sections 7 and 8 of the Administrative Procedure Act where these sections are deemed applicable; and the adoption of rules without notice or opportunity to be heard where the exemptive provision of section 4 are considered applicable. Also included would be those proceedings, arising from petitions or otherwise, which lead to a determination not to institute any procedure looking toward the adoption of a particular rule. In proceedings governed by the procedures of section 4(b), the Commission customarily affords opportunity for the submission of written comments but does not usually provide for oral argument. Notwithstanding

the exemptive provisions of section 4, the Commission has from time to time allowed for the expression of views, either written or oral, where substantial procedural rules or policy questions were under consideration.

The subject matter which these proceedings encompass is broad, exceedingly detailed, and in many instances highly technical. It covers the organization of the Commission, the practice and procedure which govern agency functions, and the substantial rules applicable to the various communication services under the Commission's jurisdiction.

In the field of common carrier regulation rulemaking deals with such subjects as services, the distribution of traffic, and the lawfulness of carrier charges, classifications, regulations, or practices.

With respect to radio regulation, part 2 of our rules and regulations (47 CFR 2.1 et seq.), contains the Commission's rules relating to the allocation, assignment, and use of frequencies within the radio spectrum; rules governing radio emissions and bandwidths; rules relating to the identification of radio communications and allocation and use of call signals; rules governing distress, disaster, and emergency communications; rules on equipment type approval and type acceptance; and regulations effectuating laws, international treaties, and other agreements pertaining to frequency assignments.

Part 3 of the Commission's rules and regulations (47 CFR 3.1 et seq.) contains our rules governing standard (AM), FM, television, noncommercial educational FM, and international broadcast stations. Among other things this section contains provisions regarding equipment standards, technical and other operating requirements, licensing policies of the Commission with respect to these services, and, for FM and television, a table of channel assignments.

Other sections of the rules set forth technical standards, engineering requirements, operating requirements, and other regulations applicable to the remaining broadcast and nonbroadcast services. Included within these services are experimental, auxiliary, and special broadcast services (47 CFR 4.1 et seq.); experimental radio services (47 CFR 5.1 et seq.); fixed public radio services (47 CFR 6.1 et seq.); land stations in the maritime service (47 CFR 7.1 et seq.); shipboard stations in the maritime service (47 CFR 8.1 et seq.); aviation services (47 CFR 9.1 et seq.); public safety radio services (47 CFR 10.1 et seq.); industrial radio services (47 CFR 11.1 et seq.); amateur radio services (47 CFR 12.1 et seq.); radio stations in Alaska (47 CFR 14.1 et seq.); land transportation radio services (47 CFR 16.1); industrial, scientific, and medical services (47 CFR 18.1 et seq.); citizens radio service (47 CFR 19.1 et seq.); the disaster communications service (47 CFR 20.1 et seq.); and domestic public radio services (other than maritime mobile services) (47 CFR 21.1 et seq.). Remaining sections pertain to commercial radio operators (47 CFR 13.1 et seq.); the use of incidental and restricted radiation devices (47 CFR 15.1 et seq.); and rules concerning the construction, marking, and lighting of antenna towers and supporting structures (47 CFR 17.2 et seq).

*Adjudication (nonhearing)*

Included under this heading are all "final determinations of any kind," excepting rulemaking, which do not result in hearings. For the most part these determinations would take the form of final agency action on applications of various types. It would be virtually impossible to prepare a definitive list in terms of subject matter of all types of Commission actions within this general category because of the tremendous number of applications involved. For example during the 1958 fiscal year the Commission received more than 537,000 applications involving requests for action in the following general areas: broadcasting, common carrier, safety and special radio services, experimental authorizations, and radio operator authorizations. Fewer than 500 of these applications resulted in hearings. Though not all inclusive, the following list characterizes in terms of subject matter generally what is involved in these proceedings.

Broadcast applications: authority to construct a new station or to make changes in an existing station; extension of construction permit or for a construction permit to replace an expired permit; remote control operation; application for a license to cover construction permit; application to use former main transmitter or antenna as an auxiliary; modification of license; renewal of license; voluntary assignment or transfer of control; involuntary assignment of license or transfer of control; temporary authorization; renewal or modification of special service authorization; standard broadcast station experimental operation; authorization to transmit programs to foreign radio stations; application to determine operating power by direct measurement of antenna power; requests

for permission to use lesser grade operators; requests for extension of authority to operate without certain indicating instruments.

Common carrier applications: interlocking directorates; construction, extension, acquisition, or operation of lines; discontinuance, reduction, or impairment of service; consolidation or acquisition of telephone companies; cable landing licenses; application for special tariff permission; petitions for suspension of tariff schedules; radio station construction permits and licenses as well as renewals and modifications thereof.

Safety and special radio service applications: construction permits and extensions thereof; voluntary and involuntary assignment or transfer of control; special temporary authorization; renewal of license; ship radio inspection or periodical survey of ship subject to compulsory radio requirements; exemption from compulsory ship radio requirements.

Experimental (broadcasting): Applications for construction permits, modifications, and renewals of stations involved in experimental television broadcasting; experimental facsimile broadcasting; developmental broadcasting; remote pickup broadcasting; standard and FM broadcast studio-transmitter links and FM intercity relay; television pickup; television studio-transmitter link; television intercity relay; television broadcast translators.

Experimental (research or development): Various types of applications dealing with experimentations in scientific or technical radio research; development of radio technique, equipment, or engineering data not relating to an existing or proposed service; communications essential to research projects; technical demonstrations of equipment or techniques; development of radio equipment, operation, or engineering data related to an existing or proposed radio service; field strength surveys by persons not eligible for authorization in any other service or the demonstration of equipment by manufacturers to prospective purchasers for proposed stations in existing services; testing of equipment in connection with production or type approval of such equipment.

Radio operator authorizations: Commercial radio operator; amateur radio operator.

In addition to the granting without a hearing of applications in categories such as the above, the Commission also takes what might be termed final action in a number of other adjudicatory situations which do not result in hearings. These would include such things as actions on requests for waiver or exemption from Commission regulations or from provisions of the Communications Act, where the Commission is authorized to grant exemptions. From time to time the Commission also issues declaratory rulings, as provided by section 1.17 of its Rules (47 CFR sec. 1.17) and section 5(d) of the Administrative Procedure Act (5 U.S.C. 1004(d)). A frequent example are its rulings regarding political broadcasts and the equal time requirements of section 315 of the Communications Act (47 U.S.C. 315).

The consideration of information or complaints wherein it is determined that no formal hearing is required offers another example of a type of nonhearing adjudication. Such complaints will of course cover a wide variety of subjects. Detailed procedures for dealing with complaints against common carriers, involving such matters as charges, service, unjust discrimination, etc., are set forth in sections 1.416–1.435 of the Commission's rules (47 CFR secs. 1.416–1.435). Complaints, reports, or other information considered in connection with the question of possible future action looking toward suspension or revocation of licenses would normally deal with the subject matters set forth in the applicable sections of the Communications Act—sections 303(m) and 312 (47 U.S.C. sec. 303(m), 312). In the case of radio-operator suspensions, this would include such things as violations of the act or the Commission's rules, fraud in obtaining a license, willful damage to equipment, the transmitting of profanity, false or deceptive signals, improper call signs, etc. In the case of license revocations, knowing misrepresentation, repeated failure to operate as set forth in the license, failure to observe cease-and-desist orders, failure to observe applicable rules, statutes, and treaties are examples of the subject matter considered.

Lastly, mention might be made of inquiries or investigations conducted pursuant to the Commission's general authority or under sections 403 and 404 of the Communications Act (47 U.S.C. secs. 403, 404). These may be broad general inquiries into such things as network practices, the ownership of broadcast facilities by newspapers, or the utilization of the radio spectrum; or they may be considerably less formal and more limited in their scope such as those fre-

quently conducted by the staff at the direction of the Commission for the purpose of obtaining information regarding the desirability of a formal hearing or other action in connection with specific pending matters. None of these proceedings, it should be pointed out, would necessarily result in a "final action" as the term is usually understood; rather they would ordinarily provide the basis for "determinations as to the desirability of agency action," and it is in this sense that they would be brought within the scope of the present inquiry.

*Adjudication (hearing)*

Generally speaking the subject matter of these proceedings would include most of those items set forth in the preceding section. A list of the generally recognized types of proceedings conducted by the Commission and the typical subject matter dealt with are set forth below.

Hearings on applications for operator licenses and renewals or suspensions thereof. The subject matter of those hearings would normally relate to the qualifications of the applicant and, in the case of suspensions, to those considerations specified in section 303(m), mentioned above.

Hearings on applications involving radio station facilities conducted pursuant to section 309 of the act, (47 U.S.C. sec. 309). Considered in these hearings are such matters as the financial, legal, technical, and other qualifications bearing on the public interest of applicants for construction permits or licenses, modifications, or renewals thereof, assignments or transfers of construction permits or station licenses, etc. Applications for permission to transmit program material to foreign stations for rebroadcast in the United States are also governed by section 309.

Protest proceedings under section 309(c) (47 U.S.C. sec. 309(c)). This type of hearing is conducted after a grant has been made without a hearing where a party in interest comes forward with allegations that the grant was improperly made or otherwise not in the public interest. While normally the subject matter of these hearings would be substantially similar to those considered in 309(b) hearings, the latitude with which the courts have interpreted section 309(c) has necessitated a hearing on virtually any "fact or situation" alleged which, if proved, might tend to show that the grant was not in the public interest. Moreover, as discussed in a letter dealing with court decisions which I am concurrently transmitting to you, in these protest hearings the Commission has been directed to hold evidentiary hearings with respect to the effect upon the public of such economic injury as an existing licensee alleges will be visited upon him by the authorization of a competitor in the community.

Revocation proceedings. The subject matters as well as the procedure of these hearings is set forth in section 312(a) of the Communications Act (47 U.S.C. sec. 312(a)). As already noted, the matters normally considered here would include misrepresentation, repeated failure to operate in accordance with the license, failure to observe cease-and-desist orders, etc.

Cease-and-desist proceedings. Pursuant to section 312(b) of the act (47 U.S.C. 312(b)) the subject matter of these hearings as specified in the statute includes violations of license terms, the Communications Act or FCC rules.

Hearings on modifications sought by the Commission in the terms of existing licenses or permits.

Hearings on FCC orders regarding common carrier services and charges.

Hearings on complaints involving payment of damages by a common carrier to a complainant.

Hearings on common carrier applications for consolidations.

Hearings on common carrier merger applications.

RESPONSE TO QUESTION 2

Requirements for a hearing in cases of adjudication are imposed by the following sections of the Communications Act, with the decision in each instance being made on the basis of the hearing record:

1. Section 201(a) of the act (47 U.S.C., sec. 201(a)) authorizes the Commission to require common carriers—"* * * after opportunity for hearing, to establish physical connections with other carriers, to establish through rates and charges applicable thereto * * * and to establish and provide facilities * * * for operating such through routes."

2. Section 209 (47 U.S.C., sec. 209) provides that, if "* * * after hearing on a complaint" filed under section 208 the Commission determines a party complainant is entitled to money damages, the Commission shall order the carrier

complained of to pay the sum to which the complainant is entitled on or before a day named.

3. Section 221(a) of the act (47 U.S.C. 221(a)) requires that where two or more telephone companies have applied for authority to consolidate—"* * * public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority."

4. Section 222(c)(1) of the act (47 U.S.C., sec. 222(c)(1)) requires that where two or more domestic telegraph companies have filed applications for authority to merge—"* * * the Commission shall order a public hearing to be held with respect to such application * * *"

5. Section 303(m)(2) of the act (47 U.S.C., sec. 303(m)(2)) provides that, where a licensee operator has been notified in writing of the proposed suspension of his license for any of the causes specified in section 303(m)(1), he "* * * may make written application to the Commission at any time within said 15 days for a hearing upon such order." On receipt of an application for hearing, the order of suspension is held in abeyance "* * * until the conclusion of the hearing."

6. Section 309(b) (47 U.S.C., sec. 309(b)) provides that where the Commission has formally designated an application for hearing because of its inability to find that a grant of that application would serve the public interest, or convenience, and after notice of the hearing is given—any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

7. Section 309(c) (47 U.S.C., sec. 309(c)) provides that, where the Commission finds a protest is valid and a hearing is necessary thereon, it—"* * * shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented."

8. Section 312(c) (47 U.S.C., sec. 312(c)), provides that when an order to show cause has been served in a license revocation or cease-and-desist proceeding, the order shall require the licensee or person on whom it is served "* * * to appear before the Commission at a time and place stated * * * and give evidence upon the matter specified therein." Subsection (d) of section 312 also provides that "In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

9. Section 316(a) (47 U.S.C., sec. 316(a)), provides that where an existing licensee or permittee has been notified in writing of proposed modification of his license or permit he shall be "* * * given reasonable opportunity, in no event less than 30 days, to show cause by public hearing, if requested, why such order of modification should not issue." Subsection (b) of section 316 further provides that in cases "* * * where a hearing is conducted pursuant to * * * this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

In addition there are a number of requirements in the Communications Act for a hearing in specified rulemaking situations, although the act does not specifically state that the decision in these proceedings shall be based on the record of the hearing. At the present time the Commission has outstanding a notice of proposed rulemaking containing provision whereunder the Commission would specify in advance when persons given an opportunity to be heard must express their views only on the record. The determination whether or not a proceeding should be conducted in this manner would be made on a case-to-case basis and governed by the individual circumstances. The following are those sections of the Communications Act which provide for hearing in rulemaking proceedings:

1. Section 201(a), applicable to common carriers, requires the Commission to afford a carrier the opportunity for hearing when it believes that additional common-carrier service would be in the public interest.

2. Section 204, applicable to common carriers, requires the Commission to afford an opportunity for hearing to a common carrier filing any new charge.

classification, regulation, or practice, whenever the Commission questions the lawfulness of such new charges, rates, etc.

3. Section 214(d), applicable to common carriers, requires the Commission to afford a carrier the opportunity for hearing when the Commission believes it may serve the public interest, convenience, or necessity to require the carrier to extend its lines or to provide itself with adequate facilities for the efficient performance of its services as a common carrier.

4. Section 221(c), applicable to common carriers, requires the Commission to hold a hearing when, for the purpose of administering the act, the Commission desires to classify the property of any such carrier used for wire telephone service and to determine what proportion thereof is being used in interstate or foreign telephone toll service.

5. Section 222(e)(3), applicable to domestic telegraph carriers, requires the Commission to hold a hearing when it desires to determine whether or not any distribution of telegraph traffic among consolidated domestic carriers, or division of charges for such traffic, may be unjust, unreasonable, or inequitable, or otherwise not in the public interest.

6. Section 303(f), applicable to radio licensees, requires the Commission to afford a licensee or permittee a hearing when the Commission desires to adopt regulations which have the effect of changing the frequencies, authorized power, or times of operation of any station and such station has not consented to such changes.

RESPONSE TO QUESTION 3

In virtually all of the instances listed in question 2, some type of preliminary determination is necessary. This may be nothing more than a finding that a protestant has submitted allegations sufficient under the statute to allow him to adduce evidence thereon in a formal hearing, even though the Commission has not been persuaded to adopt the issues as its own. On the other hand it may be a determination, under section 303(m) of the act, that a radio operator has committed an act warranting suspension of his license.

The "proceedings" on which these preliminary determinations are based vary with the nature of the case. They may involve consideration by the Commission of such things as field reports, the results of staff investigations, informal complaints from various sources, correspondence, pleadings and documents bearing security classifications. Normally, the "proceedings," which lead to preliminary determinations, are not made a part of the formal record on which the ultimate decision rests and some of the information considered, such internal working papers, unevaluated complaints and security information is not suited for general disclosure. Since, however, only those matters which are placed in the formal record can be considered in reaching a decision, the evidence adduced at the hearing will be based in part on the information which was relied on in reaching an initial determination which resulted in the hearing.

RESPONSE TO QUESTION 4

There are no particular types of cases in which the Commission is given a specific option whether its final determination is made "on the basis of the record of a hearing at which interested parties are entitled to present their views."

There have been instances, however, in which the Commission has afforded full adjudication of disputed administrative action when there is no statutory requirement for doing so. For instance, section 208 (47 U.S.C., sec. 208) of the Communications Act authorizes the filing of a complaint by any interested person against a common carrier, complaining of violations of the Communications Act. In specific terms, this section does not impose a statutory requirement for a hearing, so as to bring such complaints within the requirements for adjudication contained in section 5 of the Administrative Procedure Act (5 U.S.C., sec. 1006). However, where the Commission determines, upon the basis of any complaint filed and answers responsive thereto, that disputed issues of fact require a hearing, such a complaint is set down for a hearing under our regular procedural rules.

With respect to rulemaking, excepting those circumstances listed under the response to question 2 where a hearing is mandatory, the Commission could at its discretion institute evidential type proceedings in other cases where only the minimum requirements of the Administrative Procedure Act would suffice from a legal standpoint. This has seldom been done, however, since in most instances

the issues are such that there would be no inherent advantage in an evidential hearing, an examiner's report and other requirements of sections 7 and 8 of the Administrative Procedure Act.

From time to time the Commission has conducted studies or inquiries in which oral testimony is presented. Recent examples of this are the hearings held in connection with the Commission's network study (docket 12285) and its inquiry into the allocation of the radio spectrum in the frequency bands 890 megacycles and above (docket 11866) and in the bands from 25 to 890 megacycles (docket 11997). These proceedings were intended, however, to result in no final determinations but to provide a source of information to be drawn on in the future in connection with the formulation of policies, proposed rules, preparatory plans for international negotiations, etc.

RESPONSE TO QUESTION 5

The vast majority of matters which in a technical sense can be termed adjudicatory are disposed of without a hearing. These would include in particular sections on applications under title III of the Communications Act where the Commission is able to find on the basis of the information before it that a grant of the application would be in the public interest and all matters involving the imposition of sanctions where it is determined that no action adverse to a party will be taken. It should be pointed out, however, that notwithstanding the number of matters disposed of without hearing, the Communications Act, as the response to question 2 indicates, affords exceedingly broad opportunity for interested parties to be heard if they so desire.

In rulemaking the Commission has held the view that unless directed by statute its determinations were not necessarily limited to the record. Thus in adopting rules the Commission has not limited itself to a consideration of comments which interested parties may have submitted, but has felt free to draw upon other sources as well. In the comments which the Commission submitted to H.R. 4800 the reasons underlying the position have been set forth in some detail.

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OCTOBER 1, 1959.

Hon. OREN HARRIS,
*Chairman, Special Subcommittee on Legislative Oversight,*
*House of Representatives, Washington, D.C.*

DEAR CONGRESSMAN HARRIS: This is with further reference to your letter of July 15, 1959, which contained a questionnaire seeking information descriptive of agency proceedings and the extent to which ex parte communications should be allowed in these proceedings. A substantial portion of the information requested was transmitted to the subcommittee in my letter of August 1, 1959, which indicated that the remaining material would be supplied at a later date. This information, consisting of responses to questions 6, 7, 8, and 9, is attached. While, for the reasons stated therein, the responses are brief and general, I hope they will be of some assistance to the subcommittee.

Sincerely yours,

JOHN C. DOERFER, *Chairman.*

Questions 6 through 9 pertain to the subject of ex parte communications in various types of agency proceedings. It is somewhat difficult to formulate generalized statements, applicable without exception, concerning the usefulness or propriety of ex parte communications in each of the various types of agency proceedings, because it is impossible to anticipate all the factors which might be present in a given situation. Any determination as to the propriety of such communications might well, in individual cases, require consideration of the nature of the presentation, its source and the motives behind it, as well as the type of proceeding involved. There are, moreover, pending before the Commission several adjudicatory cases which raise in specific factual situations issues similar to those which your questions present in more general form, and I am naturally reluctant to express any view in response to your questionnaire which might be construed as prejudging the issues in those cases. Consistent with these qualifications the following comments are submitted for the consideration of the subcommittee. It should be noted that references to ex parte communications are intended to include only those presentations which pertain to the merits of the proceeding.

RESPONSE TO QUESTION 6

As to those proceedings in which ex parte communications should be prohibited, the Commission has consistently supported the principle that adjudicatory hearing cases must be decided on the basis of the evidence of record, except for those matters of which official notice may properly be taken. Section 409(c)(2) of the Communications Act provides that "no person who has participated in the presentation or preparation for presentation of such a case * * * shall * * * directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate." On December 9, 1958, the Commission submitted to this section which would make the present prohibition against ex parte presentations clearly applicable to any person, whether or not a party to the proceeding. (This proposal, S. 1734, was not introduced in the House of Representatives because H.R. 4800 provides for the repeal of sec. 409(c)(2).)

In addition to adjudicatory cases which have been designated for hearing, it would be plainly erroneous so far as the Administrative Procedure Act is concerned to consider ex parte communications in any rulemaking proceeding which is required by statute to be made on the record after opportunity for a hearing. Section 1.214 of the Commission's rules provides that in such cases the hearing and decisional requirements of sections 7 and 8 of the Administrative Procedure Act would apply.

In addition to the foregoing, I might also mention that the Commission has outstanding at the present time a rulemaking proposal which, if adopted, would establish a new class of proceedings in which the consideration of certain types of ex parte communications would be prohibited—those cases which are, strictly speaking, rulemaking, and are not required by statute to be decided on the record, but wherein, as stated in the notice of proposed rulemaking, "the circumstances indicate that the comments of interested persons should be limited to the record." Although recognizing that such cases may arise from time to time, the proposed rule does not attempt to set forth standards or criteria for determining when the new procedure would be controlling, leaving this for determination by the Commission on an ad hoc basis. The rule, if adopted, would bar the submission and consideration of "written materials bearing on matters in issue" except in the manner prescribed in the notice of proposed rulemaking. Similarly, no person would be allowed to consult with Commissioners or members of the staff regarding the matters at issue without notifying all parties to the proceeding and affording them opportunity to be present.

RESPONSE TO QUESTION 7

I would say that we have no particular types of agency proceedings in which it would be desirable for effective administrative action to allow ex parte communications, but only if they are made a matter of public record. While it might appear that, at least as to some kinds of agency matters, the placing of all ex parte communications in the public record could eliminate whatever potential harm might otherwise exist, the number of practical difficulties involved in carrying out the proposal make it of doubtful value. Several of the problems involved were referred to in my remarks during the panel discussion conducted by the special subcommittee (see transcript of hearing for June 17, 1959, vol. 2, pp. 82–83). The Commission's comments on H.R. 4800, a copy of which is enclosed, also treat in some detail the difficulties involved in attempting to apply this type of procedure (see pp. 12–14).

RESPONSE TO QUESTION 8

I believe that, generally speaking, it is desirable and necessary for effective administrative action, that with the above-noted exceptions of adjudicatory hearings, statutory rulemakings, and special types of rulemaking proceedings (see response to question 6) the agency be permitted considerable freedom of communication and action in its activities. A number of the considerations underlying this belief are set forth in the Commission's comments on H.R. 4800 which were submitted to the Committee on Interstate and Foreign Commerce subsequent to the receipt of your questionnaire. Attention is invited in particular to pages 3 through 7 of the comments. (For convenience a copy is attached.)

RESPONSE TO QUESTION 9

The foregoing responses have dealt with communications from outside the agency. I believe that a distinction must be made between these and staff communications. The Commission must necessarily rely to a considerable degree on its staff, and materials presented for its consideration by the staff, such as internal working papers, memorandums, and oral presentations, which are essential to the conduct of the agency's affairs. As your committee knows, the Communications Act places a rather severe limitation on the use the Commission may make of its staff in adjudicatory matters which have been designated for hearing. An amendment to section 5(c) of the act, proposed by the Commission to permit greater discretion in the utilization of the Office of Opinions and Review, was recently passed by the Senate (S. 1738). However, I believe the provision in the Administrative Procedure Act, that communications in adjudicatory cases between agency heads and those members of the staff who performed investigative or prosecuting functions in the matters must be on the record, is a more reasonable restriction. Beyond this, I feel that free communication and interchange of information and opinion between the staff and the Commission or Commissioners, on an ex parte basis, if it be so termed, is not only entirely proper, but is necessary and conducive to the effective and expeditious handling of the Commission's business.

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### 7. Answers of Civil Aeronautics Board

ANSWERS OF CIVIL AERONAUTICS BOARD TO QUESTIONNAIRE OF SPECIAL SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, JULY 15, 1959

INTRODUCTION

The Board's answers keyed to the nine questions are set forth below. However, in response to the invitation to set forth additional material separately from the answers, and because of the complexity of the subject matter, the specific answers are prefaced by the following brief overall statement of the Board's position in respect of the general subject matter of the questionnaire.

Initially, it may be stated that for purposes of this questionnaire the various types of Board regulatory proceedings subsequently discussed are classified primarily in relation to the statutory procedural requirements governing them, as distinguished from the Administrative Procedure Act definitions of adjudication and rulemaking. Thus, the economic proceedings are generally classed as "hearing" and "nonhearing" ones, divided as follows: (1) Those required to be determined on the basis of a record after opportunity for evidentiary hearings; (2) those conducted pursuant to the rulemaking provisions of section 4 of the Administrative Procedure Act (regulations promulgated after consideration of written comments but without evidentiary hearing); and (3) those particularized actions affecting individual interests which are taken on the basis of pleadings and without evidentiary hearings. Additionally, in relation to air safety, the Board determines the probable cause of aircraft accidents after investigation, and these proceedings are separately discussed.

Also, in relation to the overall problem of ex parte communications, some preliminary definition of the term is in order. As reflected by the Board's existing principles of practice, the Board deems the term to relate primarily to communications to the Board or its staff on the merits of a particular matter by or on behalf of parties to a proceeding (or persons outside the Board whose interest would give them standing to participate), which are not served on other parties, or, if oral, not made in the presence of their representatives. Excluded are so-called status and procedural inquiries together with preliminary staff discussion relating to agreement as to matters to be adjudicated, offers of settlement, and the like. The same is true with respect to those spontaneous communications received from the general public in relation to Board proceedings, and intra-Board communications also should be regarded as occupying a separate cate-

gory. In the Board's view, status and procedural inquiries are in nowise improper, but rather represent the normal and expected course of action.[1]

Somewhat similarly, spontaneous letters received from the general public are neither regarded as improper nor can they be prevented.[2] Intra-Board communications are necessary to effective functioning, and there should be no barriers or publicity in relation thereto save as required by the separation-of-functions provisions of the Administrative Procedure Act.

In the light of these observations and definitions, and the recognized principle that one person ought not be permitted to privately urge his adversary interests in contested matters, the Board's position is as follows with respect to ex parte communications:

1. There should be no private communications to the Board or its staff in relations to the merits of matters required to be determined on an evidentiary record, nor any communication in cases between staff members and the Board which is contrary to the separation-of-functions provisions of the Administrative Procedure Act. The Board's existing regulations so provide, and indeed go further and exclude communications to the Board from a staff member who participated in a hearing as witness or counsel even though the proceeding is one to which the separation-of-functions provision does not apply.

2. In proceedings conducted pursuant to section 4 of the Administrative Procedure Act for the formulation of substantive economic regulations, there are no parties and hence no list of persons to be served. Written comments received should be placed in the public file (subject of course to security regulations). However, there should be no absolute barrier to private discussions concerning these matters, particularly since many of them do not involve adversary interests, relate on occasion to highly technical matters, and the process of formulation is akin to that of the legislative one. There should be no barrier to private discussions concerning procedural regulations which of themselves do not affect private rights.

3. In particularized actions affecting individual carriers not required to be determined on the basis of a record, it often is necessary for the staff to obtain additional information, there are sometimes emergency matters, etc. Consequently, again there should be no absolute barrier against ex parte communications.

4. There should be no barrier to ex parte communications in the field of aircraft accident investigations.

In respect of the suggestion that ex parte information received by the Board in any proceeding should be inserted in the public record of such proceeding, the Board presently follows this practice in the case of ex parte communications received in writing from third persons. Further, any requirement of making a written record of all the various communications received by the Board would impede the Board's functioning and probably be prohibitive in cost. It also would serve to transform what are now informal processes to formal ones. Furthermore, the Board's practice of stating the factual and legal basis of its orders in the form of findings and conclusions serves to advise interested parties of the information relied upon by the Board. The Board, therefore, does not see any great need for such a requirement which would justify its cost.

In sum, the question of ex parte communications is one which does not permit of generalizations applicable to all situations. The Board, if it is to function effectively, must retain that freedom of contact necessary to obtain overall background information, together with needed data in relation to matters handled in informal fashion. Time does no permit of a complete analysis and evaluation of all the aspects of the overall problem. Further comments thereon may be supplied in the Board's comments to be submitted on pending bills.

*Question 1. Please list and briefly characterize as to subject matter all of the procedures of your agency which result in a final determination of any kind. This includes determinations as to the desirability of agency action; e.g., the*

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[1] Status inquiries are those relating to the existing status of a particular proceeding; and procedural inquiries are those as to how a particular matter may be brought on for Board consideration, etc. The Board's staff habitually responds to inquiries with respect to the latter matters, and particularly in relation to civic representatives unfamiliar with the Board's procedures. Also the Board's staff charged with responsibility for the conduct of a particular proceeding necessarily must confer on occasion with the parties concerning matters which can be stipulated, offers of settlement, etc.

[2] Sections 401 (c) and (g) and 402 (d) and (f) of the Federal Aviation Act provide for the filing by interested persons of memorandums in protest or support of particular applications. Spontaneous communications fall into this general category and they are filed (as are written status or procedural inquiries) in the docket to which they relate.

*proceeding leading to a determination whether enforcement procedures should be invoked.*

Answer: The procedures of the Board which result in final determinations of some kind may for convenience be divided into the four categories of rulemaking normally conducted under the provisions of section 4 of the Administrative Procedure Act, decisions upon record after formal hearing, decisions in nonhearing matters, and determination of the probable cause of accidents involving civil aircraft. They are listed and characterized as to subject matter below.

*I. Rulemaking*

Under the provisions of section 4 of the Administrative Procedure Act. This is the procedure which results in the promulgation of agency regulations issued pursuant to statutory authority and necessary to carry out the provisions of, and to exercise and perform the Board's powers and duties under, the Federal Aviation Act of 1958. A complete set of the Board's regulations, as in force at this date, is appended to the signed copy of these answers for the committee's convenience. These regulations are codified as chapter II of title 14 of the Code of Federal Regulations and divided as to subject matter into five subchapters:

(*a*) *Economic regulations.*—Economic rules and regulations implement the economic regulatory provisions of the Federal Aviation Act of 1958.[3] These regulations serve the following principal functions:

1. Establishing the form requirements and contents of applications, tariffs, reports, and other materials filed with the Board. See parts 201, 211, 221, 231, 232, 241, 242, 243, 244, 245, 246, 248, 251, 261, 262, and 290.

2. Establishing conditions for authorizations. See parts 212, 235, 263, and 295.

3. Establishing filing and reporting requirements. See parts 234, 241, 242, 243, 244, 245, 246, 248, and 262.

4. Establishing air carrier accounting systems. See parts 241, 242, and 248.

5. Establishing record retention and inspection rules. See parts 240 and 249.

6. Prescribing rules of conduct for air carriers. See parts 202, 203, 205, 206, 212, 223, 228, 233, and 234.

7. Conferring operating authority on classes of air carriers. See part 207 (charters and special services of certificated air carriers); part 291 (classification and exemption of large irregular air carriers[4]); part 292 (classification and exemption of Alaskan air carriers); part 293 (classification and exemption of Alaskan air taxi operators); parts 296 and 297 (classification and exemption of indirect air carriers—domestic and international airfreight forwarders); part 298 (classification and exemption of air taxi operators).

8. Exempting or relieving classes of air carriers from certain provisions of title IV of the act. See parts 224, 225, 227, 294, and 299.

(*b*) *Procedural regulations.*—Procedural regulations determine the Board's procedures vis-a-vis parties and the public in exercising its substantive powers and functions. In addition to a statement of the principles of practice before the Board (pt. 300), the Board has rules of practice in air safety proceedings (pt. 301), economic proceedings (pt. 302), and aircraft accident investigation hearings (pt. 303). Rules governing disclosure of aircraft accident investigations information, necessary to protect the detached character of this function, are contained in part 311.

(*c*) *Safety investigation regulations.*—Parts 320 and 321 contain rules concerning reporting of accidents and the exercise of the safety investigation function by the Board.

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[3] The Board has power to make rules also under the Loan Guaranty Act of Sept. 7, 1957, 71 Stat. 629, but no such rules have been promulgated.

[4] These are air carriers using aircraft of more than 12,500 pounds maximum takeoff weight. Part 291 authorized and regulated their operations in interstate, overseas, and foreign air transportation. Order E–9744 was intended to replace part 291 as the operating authority for these carriers which then were named supplemental air carriers, but it never took effect in respect of foreign air transportation. Order E–13436 of Jan. 28, 1959, has since in turn replaced order E–9744 in interstate air transportation and provided for certification of supplemental air carriers. Both order E–9744 and order E–13436 are involved in litigation, the Board's power to create the large irregular air carrier industry being challenged by the certificated trunkline air carriers.

(*d*) *Special regulations.*—Regulations which are sui generis or whose subject matters fall within several of the other categories are placed under this heading. At this time it contains only "Part 375: Navigation of Foreign Civil Aircraft Within the United States," which implements the Board's functions under section 1108(b) of the act.

(*e*) *Regulation policy statements.*—This subchapter, in part 399, contains formalized statements of Board policy, published pursuant to section 3(a)(3) of the Administrative Procedure Act.

*II. Decisions required by statute to be made on the record after formal hearing*

The exercise of this function results in determination of legal rights or duties of parties to a proceeding. It includes instances of economic licensing, determination of lawful rates, various approvals of carriers' actions and relations in the economic field, review of certain actions of the Administrator of the Federal Aviation Agency, and decisions in enforcement cases. The list is as follows:

1. Certification of air carriers upon application; establishment of additional services; orders altering, amending, modifying, or revoking certificates under section 401. The exercise of this function in relation to overseas and foreign air transportation is subject to Presidential approval under section 801.

2. Establishment of through air transportation service and joint rates therefor, section 1002(i).

3. Granting, denying, modifying, suspending, and revoking foreign air carrier permits, section 402. The exercise of this function is subject to Presidential approval under section 801.

4. Ratemaking:

(*a*) Rates other than mail rates:

(i) Section 1002(d) (prescribing lawful rate or maximum and/or minimum thereof);

(ii) Section 1002(g) (passing on lawfulness of tariffs);

(iii) Section 1002(i) (establishing joint rates and divisions thereof);

(iv) Section 1003 (participation in joint boards with the Interstate Commerce Commission).

(*b*) Rates for transportation of mail: Section 406 (fixing of service mail rates and subsidy).

5. Review of denial of airman certificates by the Administrator of the Federal Aviation Agency under section 602.

6. Review of orders of the Administrator of the Federal Aviation Agency amending, modifying, suspending, or revoking air safety certificates.

7. Approval or disapproval of consolidations, mergers, or acquisitions of control under section 408(b).

8. Enforcement proceedings to prohibit violations of the act, regulations, and orders pursuant to:

(i) Section 401(g) (revocation of certificate for intentional failure to comply with the law);

(ii) Section 408(e) (acquisitions of control);

(iii) Section 411 (unfair competitive practices);

(iv) Section 1002(c) (other violations).

(9) Issuing cease and desist orders under section 11 of the Clayton Act (15 U.S.C. 21).

*III. Decisions on pleadings without hearing*

These decisions also adjudicate rights of parties and include forms of economic licensing and regulatory approvals of various kinds, as listed below. Interested persons are given opportunity to comment and express their views and positions.

1. Exemption of air carriers (including grant of operating authority), section 416(b), and of indirect air carriers (such as freight forwarders), section 101(3).

2. Granting, modifying, suspending, or revoking foreign aircraft permits (under which common carriage is not licensed), section 1108(b).

3. Approval of reduced rate transportation, section 403(b).

4. Approval of Government loans and financial aid to air carriers pursuant to section 410.

5. Review of Postmaster General's orders regarding mail schedules pursuant to section 405(b) and fixing maximum mail loads under section 405(c).

6. Withholding filed documents or other information from public disclosure under section 1104.

7. Determinations whether to institute investigations or enforcement proceedings.

As appears from subpart B of part 302 of the Board's procedural regulations (attached hereto, see the answer to this question, supra), authority to determine whether enforcement proceedings should be instituted has been delegated by the Board to the Chief of its Office of Compliance, section 302.205, 302.206. This was done to give the greatest possible effect to the principle of separation of prosecuting and adjudicatory functions. However, since the statute has vested the power to institute enforcement proceedings in the Board, the Board's regulation reserves the Board's power to institute such proceedings itself, and provide for Board review, on motion or on the Board's own initiative, of a refusal of the Chief, Office of Compliance, to institute an enforcement proceeding, section 302.205(c) of the regulations.

8. Making orders necessary to carry out the provisions of the act under section 204(a).

9. Approving guarantees of loans to certificated air carriers to finance acquisition of flight equipment to improve their service and efficiency of operation, under the act of September 7, 1957 (71 Stat. 629).

[NOTE.—Adjudicatory functions exercised prior to Dec. 31, 1958, under sec. 610 of the Civil Aeronautics Act were transferred, effective that day, to the Administrator of the Federal Aviation Agency.]

*IV. Accident investigation*

Section 701(a)(2) requires the Board to investigate accidents involving civil aircraft and to determine the probable cause thereof. The purpose of these procedures is to learn the safety lesson which may flow from the accident. The determination made is one fact, no legal rights or liabilities are adjudged, and the procedure is nonadversary and noncontentious.

Where substantial questions of public safety in air transportation are involved in an accident, the Board may convene a Special Board of Inquiry, consisting of three members, one of which to represent the Civil Aeronautics Board and to act as Chairman. These special boards have the same accident investigation powers as the Civil Aeronautics Board (Federal Aviation Act, sec. 703).

The Board may also conduct special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents in order to ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents, section 701(a)(5). These determinations also constitute factfinding without legal consequences.

*Question 2. Which of these final determinations are required by law or by current agency regulation (please cite the applicable regulation) to be made on the basis of a record of a hearing at which interested parties are entitled to present their views?*

[NOTE: In answering questions 2, 4, and 5 we interpret, because of the context, the phrase "record of a hearing at which interested parties are entitled to present their views" as meaning a record of proceedings which include a formal hearing. It should be emphasized, however, that the right of interested parties to present their views is not dependent on the holding of a hearing but is, in the great majority of proceedings, exercised by submission of views in writing, and sometimes by oral argument before the Board.]

Answer: The proceedings in which the decision must be made on a record after formal hearing are listed in the answer to question 1 under "II. Decisions required by statute to be made on the record after formal hearing."

There are no Board regulations which preemptorily require an evidentiary hearing where there is no statutory requirement therefor. However, there are provisions in the regulations which provide for such hearings in the Board's discretion.

Thus section 409 of the act prohibits interlocking relationships unless "approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby" but does not require an evidentiary hearing. The Board's regulations thereunder (14 CFR, pt. 251), provide among other things that where the Board is not convinced that a due showing has been made by the application, applicants will be so advised and thereupon may withdraw the application, or "may request that the application be assigned for hearing," or may submit additional information, in which latter case the Board on its own initiative may assign the appli-

cation for hearing (14 CFR 251.13). Similarly, in proceedings on applications for exemption where usually no formal hearing will be granted, the Board may, in its discretion, order such proceeding set down for hearing, usually upon a request showing good cause therefor (14 CFR 302.408).

See also the answer to question 4 hereof.

*Question 3. In which of the instances listed in question 2 do you make determinations preliminary to the formal hearing in proceedings which are not made a part of the ultimate record on which decision is based?*

Answer: In all formal proceedings, preliminary determinations are reflected in Board orders which are a part of the record. Staff recommendations and internal memoranda preliminary to such action are not made a part of the record. Examples of preliminary determinations are orders issued on the Board's own initiative instituting economic regulatory investigations, e.g., whether additional air transportation should be provided in a given area or whether fare levels or fare structures should be changed. Determinations whether to institute enforcement proceedings have been listed in the answer to question 1, as required by said question. Whether or not to institute a public rulemaking proceeding likewise requires a preliminary determination.

*Question 4. In what cases is it optional with the agency whether the final determination is made on the basis of the record of a hearing at which interested parties are entitled to present their views? What are the agency standards used to determine whether a hearing will be held?*

Answer: Actions which may be taken without evidentiary hearings are listed in the answer to question 1. In all cases where the holding of an evidentiary hearing is not mandatory under a statute or required by due process, the use of this procedure is optional with the Board. The Board may provide for such hearings by rule or on a case-to-case basis. The standard applied is whether an evidentiary hearing is deemed in the interest of justice and the resulting delay will not be inconsistent with the public interest. Generally speaking, an evidentiary hearing will be held where there appears to be substantial and genuine issues of fact which must be resolved before an informed decision can be made and which cannot be resolved with the necessary degree of certainty without the examination of witnesses.

The Board distinguishes between such cases and those where the difficulty or complexity of problems of law or policy makes it expedient to permit or require oral argument before the Board. No testimony is received on oral argument. Oral argument thus may sometimes be had in cases where no evidentiary record has been made, such as rulemaking proceedings.

See also the answer to question 2 hereof.

*Question 5. Which final determinations are by law or by agency regulation (please cite the applicable regulation) not made on the basis of the record of a hearing at which interested parties are entitled to present their views? This list should include all determinations which may be based in part on a hearing but for which the record is not the whole basis of decision.*

Answer: The rulemaking function as described in the answer to question 1 is exercised in proceedings not involving a formal hearing. All final adjudications for which an evidentiary hearing is neither mandatory by statute, required by due process, required by a Board regulation or held at the Board's option (see answer to questions 2 and 4) are made without an evidentiary hearing. As explained above this does not mean that persons having a substantial interest in the matter are not given an opportunity to express their positions, but on the contrary, where it can be assumed that there are such persons, notice and an opportunity to present their views in writing are afforded them. Thus a record is made even in the nonhearing cases, and it is the principal basis for the decision. Types of adjudications provided for by statute but not required to be made on the basis of an evidentiary record are listed in the answer to question 1 under "III. Decisions on pleadings without hearing."

Determinations of probable cause of accidents are not made on the basis of a formal hearing although in some instances they are based in part on a hearing held by the Board.

*Question 6. In which of your proceedings do you consider it improper for ex parte communications to be made to the agency?*

Answer: As previously indicated, in respect of cases which are decided upon a formal record after notice and hearings, the Board's rules provide in section 300.2(a) of part 300 (attached) that "It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life,

unless provided for by law." The Board generally requires adherence to accepted standards of judicial procedure in its formal hearing cases.

In proceedings for the making of substantive rules and adjudicatory proceedings not requiring an evidentiary hearing by law, a general prohibition against ex parte communications would deprive the Board of the flexibility required in the speedy disposition of such matters. Such a prohibition would apparently transform these proceedings into formal hearing cases whenever the Board needs additional information or must decide an issue of fact. Thus, in cases of this nature, the staff should be permitted to supply information to the Board, subject to preservation of the principle of separation of functions, and since such staff is not in the position of a party, such information should not be considered as an ex parte communication. In some cases ex parte information or statements of position must be solicited by the Board or its staff from third persons. But the Board believes that even in proceedings of this kind, ex parte communications from third persons should be received only where there is need therefor, and that interested persons should never be permitted to urge their case in private or to engage in behind the scene activities. In the Board's actual practice, where unfairness might result ex parte communications are not acted upon without ascertaining, however informally, the position of adversary parties in respect thereto. Furthermore, the Board's orders in nonhearing (as all other) proceedings always discloses the findings of fact on which they are based as well as the Board's rationale, thus enabling aggrieved parties to submit further information or argument in petitions for reconsiderations, and such petitions actually are filed not infrequently in nonhearing adjudicatory cases.

Probably because of this reasonable practice, ex parte communications do not appear to constitute a problem in nonhearing cases and rulemaking proceedings at this time, and the Board has received no petitions proposing extension of the ban of section 300.2(a) to this kind of proceedings. Because of the well understood difficulty of expressing the principles applicable to ex parte communications in nonhearing cases in the form of a practically enforcible rule, as well as the absence of a real problem in this respect, the Board has not adopted such a regulation on its own initiative. The matter is, however, under continuing surveillance.

See also answer to question 7 as to ex parte communications in rulemaking proceedings.

*Question 7. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed, but that such communications are proper only if made a matter of public record?*

Answer: The public rulemaking procedure of section 4 of the Administrative Procedure Act provides for submission of comments on proposed rules. There are no parties who could be served and the comments, therefore, must be ex parte. The Board, however, opens such comments to public inspection, and a recital to this effect appears in every notice of rulemaking issued by the Board. As previously indicated, parties interested in substantive rules involving adversary interests should not be permitted to comment without such comments being made public.

*Question 8. In which proceedings do you consider it desirable for effective administrative action that ex parte communications be allowed and that such communications not be made a matter of public record?*

Answer: As disclosed by the answer to question 9, the Board does not consider staff advice, other than that from staff components excluded by the separation of functions principle of sections 5(c) of the Administrative Procedure Act as expanded by the Board's rules, to constitute ex parte communications which should be proscribed or required to be made part of the public record.

Ex parte communications involving adversary interests are deemed undesirable as a matter of principle but, as stated above, in certain types of cases oral communications are unavoidable. This occurs in nonhearing adjudicatory proceedings and substantive rulemaking proceedings. However, it does not appear to lead to any practical difficulties (see answer to question 6).

In addition, as was stated in the Board's answer to question 108 of the questionnaire of this committee of November 1957, it appears to be unavoidable for the Board to receive communications which cannot be made a matter of public record from executive departments of the Government on matters involving confidential information relating to foreign affairs and national defense. This practice is restricted almost entirely to cases required by section 801 of the act to be submitted to the President, and where, therefore, the President, not

the Board, makes the final determination (*C. & S. Air Lines* v. *Waterman Steamship Co.*, 333 U.S. 103 (1948)).

***Question 9. In answering questions 6, 7, and 8, to what extent would you differentiate between communications of the agency staff to those in the agency having the responsibility for decision, whether initiated by the decisionmaker or by other agency members, and similar communications from those outside of the agency? If you do so differentiate please indicate specifically in what proceedings communications from the agency staff to the decisionmakers (and those of their immediate staff who participate in the process of decision) are highly desirable but should be made a matter of public record, and in which proceedings unrecorded communications should be allowed.***

Answer: The Board differentiates between communications from the staff and communications received from outside the agency. With respect to staff communications the Board is of the view that freedom of contact between Board and staff is desirable except where the separation of functions principle would be violated. Within the staff, however, the Board makes a further differentiation in cases to be decided exclusively on the basis of an evidentiary record. There, the Board distinguishes between members of the staff who participated in the case as public counsel or witnesses, and the rest of the staff. The former are excluded from any form of communication or consultation off the record with the Board or staff who participate in the process of decision (sec. 300 of the Board's regulations). In this the Board goes beyond the requirements of section 5(c) of the Administrative Procedure Act, the separation of functions provision. No communications from any staff components are received in such cases which go beyond the record.

In nonhearing adjudicatory proceedings and proceedings for the making of substantive rules (see answer to question 6), ex parte communications from the technical staff to the decisionmakers are necessary in presenting the matter in a form ready for decision. Of course, there are no staff members who act as parties in such proceedings, and since such communications therefore do not come from staff components which have participated in the proceeding otherwise than in performing the nonpartisan task of making it ready for decision, they are not ex parte.

Any staff communications to the Board other than those made by the staff as counsel or witnesses in a formal hearing case are part of the decisional process of the Board and should therefore not be made a matter of public record.

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